BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN CROSLEY,
Petitioner,

vs.

COLUMBIA COUNTY,
Respondent.

LUBA No. 2011-093

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Ross Day, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Day Law Group, P.C.

Robin Rojas McIntyre, Assistant County Counsel, St. Helens, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 04/11/2012

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that finds that the vested right petitioner may have had to complete construction of a residence in the location of a foundation that petitioner constructed in 1979 has been lost because petitioner interrupted construction of the dwelling for more than one year.

FACTS

Petitioner purchased a 9.45-acre parcel located approximately 7.5 miles northwest of the City of Vernonia in Columbia County in 1977. Rock Creek, a fish-bearing stream, crosses the property. Pursuant to an Oregon Department of Environmental Quality septic permit, petitioner constructed a septic system on the property in 1978. Pursuant to a county building permit, petitioner constructed a foundation on the property for a single family dwelling in 1979.

In 1984, the county adopted its first comprehensive plan and zoning regulations. The 1984 comprehensive plan and zoning regulations placed the property in a Primary Forest zone. In 1988, the county adopted regulations that impose a flood hazard overlay and require a flood hazard permit that has not been requested or granted by the county for a dwelling on the 1979 foundation. In 2003, the county adopted riparian corridor and big game habitat overlays, which require setbacks from the top of the bank of Rock Creek that the 1979 foundation does not comply with.

The record shows that beginning in 2009, 30 years after the septic system and foundation were constructed on the property, petitioner framed and completed construction of walls, a roof and deck on the 1979 foundation without seeking any additional permits from the county. The partially constructed dwelling that sits on the 1979 foundation is approximately 18 feet from the top of the bank of Rock Creek and the attached deck is approximately 10 feet from the top of the bank. That partially constructed dwelling does not

comply with the county's 50-foot riparian and big game habitat setback requirements and is located within the Rock Creek 100 year floodplain.

It is undisputed in this appeal that the expenditures petitioner made to construct the septic system and foundation were significant. There is no dispute that under the vested rights analysis required under *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973), petitioner had a vested right in 1979 to complete construction of his proposed dwelling at the location of the 1979 foundation, notwithstanding the 1984 riparian and big game habitat setbacks and notwithstanding the county's 1984 floodplain regulations. All parties also agree there was significant construction activity on the property, but that significant construction activity did not occur until 2009 and was done without any additional county permits after the county's floodplain regulations and riparian and big game habitat setbacks were in place. The only issue in this appeal is whether during the 30-year period between 1979 and 2009 petitioner lost any vested right he had in 1979 by discontinuing construction of the dwelling for a period of more than one year. In arguing that he did not discontinue construction of the dwelling, petitioner submitted an affidavit in which he set out the activities that he believes were sufficient to show that he did not discontinue construction for more than one year between 1979 and 2009:

> "* * * Several times each year I would attend to the Property, and the dwelling I was constructing on the Property. Among the work I have performed on the Property includes erecting a gate and fence, removing vegetation from the property that will interfere with the construction of the dwelling, completed plumbing and related work on the dwelling, framing and other construction related work, site work including grading and constructing the road, yearly maintenance on completed portions of the property, maintaining the foundation, repairing scaling on concrete, pest control, riparian maintenance and enhancement such as planting trees and eliminating invasive species, and additional incidental work intended to further the use of the Property for a single family dwelling." Record 76-77.

JURISDICTION

The decision that is before us in this appeal resulted when petitioner sought county approval for his partially constructed dwelling in 2011. The decision grants the requested approval, subject to conditions, that include the following:

> "12. The existing dwelling shall be relocated on the property to comply with the 50' riparian corridor setbacks (from Rock Creek) of Section 1170 of the Columbia County Zoning Ordinance [CCZO]."
>
> "13. The applicant shall relocate the existing dwelling to be in compliance with the Big Game Habitat regulations in Section 1190 of the [CCZO]."
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> "14. A revised site plan shall be submitted to Land Development Services indentifying the relocation of the dwelling. This site plan shall be drawn to scale and shall accurately reflect the dwelling's setbacks from property lines and from the top bank and wetlands of Rock Creek. Primary and secondary fuel-free fire breaks shall also be identified on the revised site plan. * * *
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> "15. The applicant shall apply for a floodplain development permit. The applicant shall submit required information of the permit and all development shall be designed to conform to the flood development standards of Section 1100 of the [CCZO]." Record 9.

The decision that is before us in this appeal appears to authorize, at least in part, a dwelling under Ballot Measure 49 (2007), Oregon Laws 2007, chapter 424, section 11. In *Maguire v. Clackamas County*, ___ Or LUBA ___ (LUBA No. 2011-040, November 14, 2011) *review pending* (CA150183), we concluded that under Section 16 of Measure 49, which is codified at ORS 195.318(1), determinations of a local government under Section 11 of Measure 49 are not land use decisions over which LUBA has jurisdiction.[1] In a November

[1] ORS 195.318(1) provides in relevant part:

> "A person that is adversely affected by a final determination of a public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007, and sections 2 to 9 and 17, chapter 855, Oregon Laws 2009, may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is made by Metro, a city or a county, or under ORS 183.484, if the determination is one of a state agency. * * * *A determination by a*

18, 2011 Order, we questioned whether we have jurisdiction over this appeal and asked the parties to discuss the jurisdictional implications of *Maguire*.[2]

This case is a bit unusual in that petitioner apparently argued below that his application should not be subjected to the riparian and big game habitat setbacks or the flood plain regulations and took the position that under his approved Measure 49 claim and Measure 49 itself those regulations should not be applied. The county rejected those arguments. If petitioner were pursuing that line of argument in this appeal, under *Maguire* we likely would not have jurisdiction to consider petitioner's appeal.

However, in this appeal we do not understand petitioner to challenge the county's analysis under Measure 49 in any way, and we do not understand petitioner to contend that under his Measure 49 claim or Measure 49 itself the county improperly imposed the conditions set out above. Instead, in this appeal petitioner contends only that he has a vested right under *Holmes* to complete his dwelling in the location that was authorized by the 1979 building permit. If petitioner is correct about that, he has a right to complete the dwelling that is independent of Measure 49, his Measure 49 claim and the county's forest template regulations, and that right is not subject to the county's riparian and big game habitat setbacks and floodplain regulations that postdate the 1979 building permit. A county decision regarding such a vested right claim, outside the Measure 49 context, is not one of the decisions described in ORS 195.318(1) and is therefore a vested right decision that is

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*public entity under ORS 195.310 to 195.314 or sections 5 to 11, chapter 424, Oregon Laws 2007 * * * is not a land use decision*." (Emphasis added.)

[2] Our reasoning in issuing that November 18, 2011 order was twofold. First, we did not want the parties to be surprised by our decision in *Maguire*. Second we wanted to give petitioner an opportunity to file a conditional motion to transfer this appeal to circuit court, in the event LUBA ultimately concluded it did not have jurisdiction. OAR 661-010-0075(11). In his petition for review, petitioner argues *Maguire* is not controlling here, and respondent agrees that LUBA has jurisdiction. Petitioner did not file a conditional motion to transfer.

within our review jurisdiction. *Forman v. Clatsop County*, 297 Or 129, 681 P2d 786 (1984); *DLCD v. Benton County*, 27 Or LUBA 49, 55-56 (1994).

We recognize that Section 5(3) of Measure 49 authorizes a property owner to complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37 waiver.[3] Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49. However, in this case, petitioner claims to have a vested right based on his 1979 building permit, not a Ballot Measure 37 waiver. Therefore the county's decision in this case that petitioner does not have a vested right to continue construction under the 1979 building permit does not fall within the decisions described by ORS 195.318(1).

ASSIGNMENT OF ERROR

A. Introduction

CCZO 1506 authorizes property owners with nonconforming uses to continue those uses and perform normal maintenance and repairs, but strictly regulates rebuilding or expansion of a nonconforming use.[4] However, CCZO 1506.4 specifically provides that if a

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[3] Section 5 of Measure 49 provides in part:

> "A claimant that filed a claim under [Ballot Measure 37] on or before the date of adjournment *sine die* of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:
>
> "* * * * *
>
> "(3) A waiver issued before the effective date of [Ballot Measure 49] to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of [Ballot Measure 49] to complete and continue the use described in the waiver."

[4] CCZO 1506 provides:

nonconforming use is discontinued for more than one year, the right to continue that nonconforming use is lost. CCZO 1506 closely parallels ORS 215.130(5)-(7) and (9)-(10),

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".1 Continuation of Non-Conforming Uses or Structures: Except as provided in this section, a Non-Conforming Use or structure may be continued, even though it is not in conformity with the use, height, area, and all other regulations for the district in which it is located.

".2 Normal Maintenance and Repairs: Normal maintenance of a Non-Conforming Use is permitted, including structural alterations to the bearing walls, foundation, columns, beams, or girders, provided that:

"A. No change in the basic use of the building occurs that would make the use less conforming to the district.

".3 A Non-Conforming Use may be changed to a use allowable under the underlying district. After a Non-Conforming Use changes to a conforming use, it shall not thereafter be changed back to a Non-Conforming Use.

".4 Reinstatement of a Discontinued Use: A Non-Conforming Use may be resumed if the discontinuation is for a period less than 1 year. If the discontinuance is for a period greater than 1 year, the building or land shall thereafter be occupied and used only for a conforming use.

"5. Rebuilding, Change, Moving, or Use Expansion: A Non-Conforming building or use may be rebuilt, moved, or changed in use to a use of the same restrictive classification or expanded, subject to the provisions outlined herein, if upon review in accordance with Section 1601 the Director finds all the following to exist:

"A. That such modifications are necessary because of practical difficulties or public need;

"B. That such modifications are not greater than are necessary to overcome the practical difficulties or meet the public need;

"C. That such modifications will not significantly interfere with the use and enjoyment of other land in the vicinity, nor detract from the property value thereof; and

"D. That such modifications will not endanger the public health, safety, and general welfare.

".6 Rebuilding: When a building or structure is damaged by fire or any other cause beyond the control of the owner, it may be rebuilt.

".7 Change of Use: A Non-Conforming Use may be changed to a use of the same or a more restrictive classification but not to a use of a less restrictive classification, pursuant to subsection 1506.5.

which similarly (1) authorize continuation of lawful uses, notwithstanding subsequently enacted land use regulations that would prohibit the use, (2) authorize normal maintenance of nonconforming structures, and (3) strictly regulate alteration of nonconforming uses.[5] ORS 215.130(7)(a) specifically provides that a nonconforming use rights may be lost through a "period of interruption * * *." Under ORS 215.130(7)(a) and CCZO 1506.4, if a

[5] ORS 215.130(5)-(7) and (9)-(10) provide in 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. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. 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.

"(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this subsection, restoration or replacement shall be done in compliance with ORS 195.260 (1)(c).

"(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.

"* * * * *

"* * * * *

"(9) As used in this section, "alteration" of a nonconforming use includes:

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

"(10) A local government may adopt standards and procedures to implement the provisions of this section. * * *"

nonconforming use in Columbia County is discontinued or interrupted for more than one year, the right to continue that nonconforming use is lost.

Under CCZO 1506.1 and ORS 215.130(5) it is quite clear that if petitioner had completed construction of his proposed dwelling before the riparian and big game habitat setbacks were adopted in 1998 and 2003, petitioner would have a right to continue residential use of such a residence, but would lose that right if residential use of the completed structure was thereafter abandoned, discontinued or interrupted within the meaning of CCZO 1506.4 and ORS 215.130(7)(a). In *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207, 221 (2000), *rev'd and remanded* 176 Or App 213, 31 P3d 458 (2001), the issue was whether these "[nonconforming use] principles of abandonment or interruption, or a similar limiting principle [also apply] to extinguish rights that have vested under *Holmes*." LUBA concluded that they do. 39 Or LUBA at 226.

Abandonment requires "intentional relinquishment of a known right," and LUBA agreed with the property owner in *Fountain Village* that the record did not show the requisite intent to abandon the proposed cabin. But the Multnomah County Zoning Ordinance (MCZO) provided that "a nonconforming structure or use [must not] be abandoned or discontinued for any reason for more than two years." MCZO 11.15.8805(B). LUBA agreed with the county that the property owner's vested right to complete construction of the cabin in *Fountain Village* had been lost through the property owner's failure to continue "significant development effort for over 2 years." 39 Or LUBA at 228.

The Court of Appeals agreed with the part of LUBA's decision that concluded that statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Fountain Village Development Co. v. Multnomah Cty*., 176 Or App 213, 224, 31 P3d 458 (2001). However, the Court of Appeals stated that it did not understand why the county and

LUBA concluded that more than "ordinary care" under MCC 11.15.8805(C) is required to avoid discontinuing a nonconforming use under MCC 11.15.8805(B):

> "As noted, the county, through incorporation of intervenor Rochlin's proposed material, endorsed and ostensibly applied the proposition that a vested right can be lost through discontinuance unless the holder engages in 'substantial effort[s] to finish the development' within the requisite period. *See* 176 Or App at 217. LUBA, in affirming-and, particularly, in performing its substantial evidence review-tested the evidence against that standard.
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> "In doing so, however, LUBA does not appear to have addressed petitioner's threshold argument that the applicable standard, if any, is 'ordinary care' and not 'substantial efforts' to complete. MCC 11.15.8805(C) provides that a 'non-conforming structure or use may be maintained with ordinary care.' Conversely, neither ORS 215.130 nor MCC 11.15.8805 uses the term 'substantial efforts.' We do not understand LUBA to have explained why 'ordinary care' is not the controlling standard or why-given the appropriate relationship between subsections (B) and (C)-'substantial efforts' can or should be the standard. Because that question is central to the inquiry, we remand to LUBA to, at a minimum, explain why 'substantial efforts' and not 'ordinary care' is the controlling standard for purposes of loss of a vested right pursuant to MCC 11.15.8805. * * *" 176 Or App at 225 (footnote omitted).

Following the Court of Appeals' remand, petitioner moved to dismiss the appeal, and LUBA was never called upon to supply the explanation that the Court of Appeals believed was missing in *Fountain Village*. Although it may not be critical in this appeal, we supply that explanation now.

In *Fountain Village*, MCC 11.15.8805(C) provided that "[a] nonconforming structure or use may be maintained with ordinary care." In this appeal, CCZO 1506.2 similarly provides "[n]ormal maintenance of a Non-Conforming Use is permitted." *See* n 4. The Columbia County and Multnomah County laws mimic, and likely were adopted to reflect, the requirement in ORS 215.130(5) that "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." ORS 215.130(5) protects a property owner's right to

maintain nonconforming "structures" and does not expressly refer to nonconforming "uses." However, there is no suggestion in ORS 215.130(5) that "maintaining" a nonconforming structure is the same thing as continuing a nonconforming use without interruption or that *any* maintenance activity a property owner may perform on a nonconforming structure will necessarily be sufficient to continue or avoid interruption or discontinuance of a nonconforming "use" of the property.

MCC 11.15.8805(C), which the Court of Appeals cited in *Fountain Village*, and CCZO 1506.2 do guarantee a property owner's right to take steps to maintain nonconforming "uses." Whatever the significance of that wording, ORS 215.130(5), MCC 11.15.805(C) and CCZO 1506.2 were adopted to prevent counties from prohibiting regular maintenance of nonconforming structures and uses or treating such maintenance as an alteration or a change of use, which is strictly regulated. While the maintenance activities that are actually taken under ORS 215.130(5), MCC 11.15.805(C) and CCZO 1506.2 presumably could have some indirect bearing on whether a property owner has abandoned, discontinued or interrupted a nonconforming use, there is simply no reason that we can think of to assume that *any* maintenance activity that is protected under ORS 215.130(5), MCC 11.15.805(C) and CCZO 1506.2 necessarily will be sufficient to establish that the property owner has not abandoned, discontinued or interrupted a nonconforming use.[6]

This analysis is even more straightforward in the case of a vested right. The right that the holder of a vested right has is the right to continue "construction" of a proposed use until construction of that proposed use is complete and the vested right is converted to a nonconforming use, or, put another way, the nonconforming use is fully established. Since the use that a vested right protects is an inchoate nonconforming use, *i.e.* a use that does not

[6] As an example, it seems highly unlikely that a maintenance action to fix a broken window in a large nonconforming industrial building would be sufficient to constitute a continuation of that nonconforming industrial use if that building was vacant and unused for industrial use during the year the window was replaced.

yet exist, there is no nonconforming use to "maintain." It is the continued "construction" of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than one year in Columbia County under CCZO 1506.4 to avoid losing a vested right to continue construction of that vested right. If petitioner discontinued or interrupted construction of the dwelling for more than one year after the construction of the foundation was completed in 1979, the fact that petitioner may have engaged in some activities that can be characterized as maintaining the foundation or maintaining or enhancing the vegetation on the property does not alter the fact that construction was discontinued or interrupted. Where construction of a residence has been discontinued or interrupted, actions to maintain the partially constructed residence are not sufficient to continue "construction" of the residence.

Returning to *Fountain Village*, MCC 11.15.8805(B) required that "a nonconforming structure or use [must not be] abandoned or discontinued for any reason for more than two years." The county interpreted that language to apply in the context of an alleged vested right to require that "substantial effort to finish the development" not be discontinued for more than two years. We see nothing wrong with that interpretation. As explained above, that interpretation is not inconsistent with ORS 215.130(5) or MCC 11.15.8805(C), which simply protect a property owner's right to perform any needed maintenance on a nonconforming use or structure and have no direct bearing on whether a nonconforming use or structure has been abandoned, interrupted or discontinued.[7] That interpretation is also not inconsistent with any other relevant statutory or MCC language that we are aware of. In reaching that conclusion we recognize that the Board of County Commissioners' interpretation of MCC 11.15.8805(C) is not entitled to any special deference under ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 258, 243 P3d 776 (2010) and *Clark v.*

[7] As noted by the Court of Appeals, at the time of our decision in *Fountain Village*, MCC 11.15.8805(C) provided "[a] nonconforming structure or use may be maintained with ordinary care."

Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Because MCC 11.15.8805(C) was adopted to implement ORS 215.130(5), and its language is similar to the statutory language, the meaning of those provisions is ultimately a question of state law. *Jordan v. Columbia County*, 42 Or LUBA 341, 344-45, 348-49 (2002).

In this case we do not really have a reviewable interpretation of CCZO 1506.4 by the Columbia County Board of Commissioners. The text of CCZO 1506.4 was set out earlier at n 4. As we explain later, the county simply applied the text of CCZO 1506.4 and concluded that the evidence in the record of this appeal supported a conclusion that construction of petitioner's residence was discontinued for more than one year between 1979, when the construction of the foundation was completed, and 2009, when construction of the walls, roof and deck were completed without additional county permits. In doing so, the county rejected petitioner's argument that the activities he set out in the affidavit were sufficient to avoid a conclusion that he "discontinued" construction for more than a one year period during the 30-year period. The relevant question becomes whether, applying the commonly understood meaning of the word "discontinued," the county correctly applied CCZO 1506.4 and whether the county's decision is supported by substantial evidence.[8]

B. The County's Findings

The county adopted a number of findings, including the following, in explaining its conclusion that petitioner discontinued construction of his proposed dwelling for more than one year following construction of the foundation in 1979:

> "The record shows that the applicant * * * obtained a building permit from the County on October 18, 1979 to construct a single family dwelling * * *. Although the applicant completed a foundation for the dwelling [in 1979], an inspection of the property revealed that by April 21, 1981, the development

[8] *Webster's Third New International Dictionary* (Unabridged 1981) defines "discontinue," in part, as "**1 a** : to break off : give up : TERMINATE * * * : end the operations or existence of * * * : cease to use * * * **b** *obs* : to cease to attend, frequent or occupy **c :** to break the continuity of * * *." *Id*. at 646.

had been discontinued. The following additional evidence in the record indicates that the development had been discontinued: aerial photographs taken in 2000 and 2005 showing no dwelling; Columbia County Assessment and Taxation printouts dated November 20, 2006 and April 5, 2007, showing the property as vacant land; letter from Todd Dugdale, Columbia County Land Development Services Director, to the Department of Land Conservation and Development recommending Measure 49 home site authorization because 'no dwelling currently exists on the property'; and the applicant's statement in his application that construction of the house was started, 'but due to economic reasons construction was stopped.' As a result, the applicant's building permit expired in April 1980, 120 days after the last recorded date of construction on the permitted development."[9] Record 53.

"* * * The applicant argues that he had a vested right to complete the dwelling. Assuming *arguendo* that the applicant had vested rights in 1979 to continue construction of the dwelling, those vested rights have lapsed.

"Vested rights are inchoate nonconforming uses and may be lost by abandonment or discontinuance. Under CCZO 1506.4, nonconforming use rights are lost after a 1-year period of discontinuance * * *.

"Here the applicant discontinued construction of the dwelling in 1979 and did not resume construction until 2009 without permits. The applicant's 30-year discontinuance far exceeds the 1-year lapse allowed by CCZO 1506.4. The Board therefore finds that any vested right the applicant may have had in 1979 to complete the dwelling has been lost by discontinuance and cannot be reinstated.

"* * * The applicant asserts that the '[p]roperty has always been used for a single family dwelling' and that he 'never abandoned the use of the [p]roperty[.]" (Aff. Of Crosley 2). The Board finds that the applicant has mischaracterized the use of the property. A foundation and septic system do not constitute a dwelling, and the record is devoid of any evidence that the property has been used as a residence. Rather, the evidence [in] the record, as described above, shows that the property has been vacant for 30 years, containing essentially a foundation for a dwelling and septic system. Although the applicant may have *intended* to use the property for a single-family dwelling during the 30-year lapse, the Board finds that construction of the dwelling was discontinued at an early stage – the foundation – and the property has never been in residential use." Record 59-60. (emphasis in original)

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[9] Petitioner's 1979 building permit stated that "[t]his permit becomes null and void if work or construction authorized is not commenced within 120 days, or if construction or work is suspended or abandoned for a period of 120 days at any time after work is commenced." Record 505.

The board of county commissioners explicitly recognized petitioner's claims in his affidavit regarding the activities he has engaged in on the property between 1979 and 2009, but concluded that those activities were not sufficient to continue construction of the dwelling over that 30-year period without any interruptions of more than one year.

We do not understand petitioner to dispute that all or nearly all of the framing, wall and roof construction and deck construction occurred in 2009. Giving petitioner the benefit of the doubt, he contends that at some unspecified times during that 30 year period he repaired concrete scaling and did some additional plumbing work, framing, grading and road construction. Even if those contentions are all accepted as true, they do not allege a great deal of construction activity and more importantly do not establish that there were no periods of one year or more where there was no construction on the subject dwelling. And even if petitioner's claims to have taken steps to control pests, maintain riparian vegetation, plant trees and eliminate invasive species are accepted as true, we understand the county to have found that such activities are not sufficient to continue *construction of the residence*. We agree with the county.

Petitioner criticizes the reliability of the other evidence that the board of county commissioners cites in support of its conclusion that construction activity on the subject property ended with construction of the foundation in 1979 and did not start again until 2009 when petitioner completed construction of the walls, roof and deck. Notwithstanding petitioner's affidavit, the aerial photographs, department of assessment and taxation printouts, the Measure 49 claim report issued by the Department of Land Conservation and Development and the applicant's own statements are all evidence a reasonable person could accept to conclude that following construction of the foundation in 1979 almost no additional construction activity was carried out on the subject property for the next 30 years and that there were periods of at least one year where construction of the dwelling was discontinued. Under CCZO 1506.4 such a period of discontinued construction means petitioner lost any

vested right he may have had to complete construction of the dwelling at the location of the 1979 foundation.

C. Petitioner's Request that LUBA Reconsider its Decision in Fountain Village

Finally, petitioner argues that a vested right, unlike a nonconforming use, cannot be lost because through abandonment, discontinuance or interruption and that LUBA and the Court of Appeals erred by concluding to the contrary in *Fountain Village*. We understand petitioner to argue that LUBA should reconsider its decision in *Fountain Village* and adopt petitioner's view that vested rights, unlike rights to continue nonconforming uses, cannot be lost through abandonment, discontinuation or interruption. In *Fountain Village* LUBA considered and rejected petitioner's argument that vested rights should be treated differently, and we decline to reconsider our opinion and reach a different result here.

Petitioner's assignment of error is denied.

The county's decision is affirmed.