BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY

ORDER NO. 00-031

Affirming the Hearings Officer Findings and Adopting Additional Findings and Conclusions in Land Use Case MC 13-99

The Multnomah County Board of Commissioners Finds:

a. Fountain Village Development Company, represented by Phillip Grillo, Attorney at Law, appealed the Hearings Officer Decision in land use case MC 13-99.

b. After proper notice of a public hearing, the Board of County Commissioners accepted testimony and evidence presented at a de novo hearing on March 9, 2000.

c. Arnold Rochlin's testimony, including the February 24, 2000 written arguments which included the Hearings Officer's document entitled Discussion of Vested Rights Claim were persuasive in determining that no vested right exists to complete a single family dwelling on the subject property.

d. Typographical errors and an error in the discussion of the Union Oil case occurred in the Hearings Officer decision as detailed in a March 9, 2000 letter from Arnold Rochlin.

e. The Hearings Officer appropriately applied the provisions of MCC 11.15.8295(A), limiting the Hearings Officer scope of review to the specific grounds raised in the appeal and the memorandum entitled Scope of Review on Appeal to Hearings Officer is evidence that this provision is consistent with state law requirements for a de novo hearing.

f. The transcript submitted by the appellant at the Hearing is not the official transcript.

The Multnomah County Board of Commissioners Orders:

1. The Hearings Officer's decision dated January 19, 2000 is hereby affirmed.

2. In addition to the Hearings Officer's decision, the document entitled Discussion of Vested Rights Claim, along with the written arguments provided by Arnold Rochlin, dated February 24, 2000 are hereby incorporated by reference and adopted as part of the County's final decision on this matter.

3. The Hearings Officer's document entitled Scope of Review on Appeal to Hearings Officer is hereby incorporated by reference and adopted as part of the County's final decision on this matter.

4. Typographical corrections to the Hearings Officer decision as detailed in the March 9, 2000 letter from Arnold Rochlin are accepted and that the clause of concern, as referenced in this letter is, therefore, stricken from the Hearings Officer decision.

ADOPTED this 30th day of March, 2000.

BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

Beverly Stein, Chair

REVIEWED:

Thomas Sponsler, County Attorney
For Multnomah County, Oregon

By _____
Thomas Sponsler, County Attorney

MULTNOMAH COUNTY
LAND USE PLANNING DIVISION
1600 SE 190TH Avenue Portland, OR 97233
(503) 248-3043 FAX: (503) 248 -3389

Decision of Land Use Hearings Officer

Case File: MC 13-99

Hearings Officer: Liz Fancher

Hearing Date: November 17, 1999

Proposed Action and Use: Determination of Vested Right to Complete Dwelling in Commercial Forest Use zone.

Location: 39050 SE Gordon Creek Road

Property Description: Tax Lot 800, Section 24, T1S, R4E, W.M.
Tax Account # R99424-0230

Zoning: CFU-4, Commercial Forest ~~Use~~

Applicant/Owner: Fountain Village Development
115 SW Ash Street #500
Portland, Oregon 97204

Procedural History

On September 24, 1999, Fountain Village Development filed a letter and land use application with Multnomah County. The County and the applicant have treated the letter and application as a request to determine the legal status of a single family dwelling on a 2.96-acre lot zoned CFU, commercial forest use. On October 27, 1999 Multnomah County issued an administrative decision. The decision concluded that no vested right exists and that any such right had been abandoned by the property owner.

On November 2, 1999, attorney Phillip Grillo filed an appeal of the administrative decision. On November 17, 1999, an appeal hearing was conducted by County hearings officer Liz Fancher. At the hearing, Mr. Grillo requested a continuance of the hearing on behalf of Fountain Village and a second hearing was scheduled for December 10, 1999. Mr. Grillo agreed that the 150-day clock of ORS 215.428 would be tolled during the period of the continuance.

On December 10, 1999 a second hearing was held. At the close of the hearing the parties were given until December 17, 1999 to file additional evidence or arguments. Both parties were allowed until December 19, 1999 to request an opportunity to rebut any new material

submitted during the post-hearing comment period. As the 19th was a Sunday, that date was changed to December 20, 1999. No requests were filed. By law, the applicant had the right to submit final written arguments for seven days following the close of the record. This date was December 27, 1999.

Planning Director's Decision

The County reviewed applicable provisions of its zoning code, MCC 11.ES.2072 and MCC 11.15.8805(B). The County treated 11.ES.2072 as the exclusive means of establishing a vested right and determined that the applicant had failed to demonstrate compliance with that code provision. The County also determined that any vested right had been abandoned and lost by virtue of the provisions of MCC 11.15.8805(B).

Grounds for Appeal

Appeals to the hearings officer are confined to the resolution of the grounds of appeal listed in the Notice of Appeal. Those grounds are:

1. The County erred, as a matter of law, by refusing to apply applicable state law with regard to the vesting of this substantially constructed single-family home. The applicant specifically requested a vested rights determination under applicable state law provisions.

2. The County erred, as a matter of law, by concluding that this action is governed by MCC .2072(A) and MCC .8805(B).

3. The County erred, factually, in its determination that there is no evidence of work being performed on this structure under a valid building permit.

4. The applicant generally agrees with Findings 1, 2, 3, 5, 7 and 8, as contained within the decision.

5. The applicant does not agree with Findings 4, 6, 9, 10, 11, 12 and 13, or the conclusion reached by staff, as contained within the decision.

Multnomah County MCC 11.15.8290(B) requires that the specific grounds relied on for reversal or modification of the Planning Director's decision be stated in the Notice of Appeal. The hearings officer's review is confined, by code, to those grounds. The hearings officer asked the applicant to submit information and arguments regarding the vested rights claim because the hearings officer would be required to address those claims if she had not upheld the County's decision under the authority of MCC 11.15.8805.

The fact the hearings officer accepted evidence on the vested rights issue does not expand the hearings officer's scope of review. Grounds for appeal and legal arguments, other than those listed in the Notice of Appeal, are outside the scope of review per MCC 11.15.8295(A).

MCC 11.15.8295(C) requires that the hearings officer adopt findings that "specifically address the relationships between the grounds for reversal or modification of the decision as stated in the Notice of Appeal and the criteria on which the Planning Director's decision was required to be based under this Chapter." This decision, therefore, restates each of the above-listed grounds and its relationship to the relevant law.

Required Findings

1. *The County erred, as a matter of law, by refusing to apply applicable state law with regard to the vesting of this substantially constructed single-family home. The applicant specifically requested a vested rights determination under applicable state law provisions.*

Findings: State vested rights law should have been considered in the County's review of the land use application.

A building permit is needed in order to authorize the completion of construction of the applicant's single-family residence. Previously issued building permits have expired. MCC 11.15.8715 (B) states that "[i]n cases where a building permit is required under the Building Code, it [the permit] shall be deemed to be a Land Use Permit." The County refused to grant a building permit to the applicant because the use proposed now requires conditional use approval. In making that decision, the County rejected legal arguments regarding state and local law that asserted a vested right to complete the single-family residence.

The Oregon Supreme Court case of Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984) held that a County decision to exempt uses from the effect of newly adopted laws under the theory of vested rights is a land use decision subject to review by the Land Use Board of Appeals. In the present case, Multnomah County decided that no vested rights exist because the application does not meet vesting criteria in the County code that were not adopted until long after the use permit was issued. The County's decision that no vested right exists is a land use decision. As a result, the hearings officer has jurisdiction to review this matter.

The Forman case makes it clear that, under the correct factual circumstances, that state vested rights case law applies to local land use reviews. The Forman case applied state vested rights laws despite the fact the local jurisdiction did not have adopted land use procedures in their land use regulations. Likewise, state vested rights law applied to Multnomah County's review of the present case. This matter is discussed in further detail in Item 2, below.

2. *The County erred, as a matter of law, by concluding that this action is governed by MCC .2072(A) and MCC .8805(B).*

Findings: The County did not err applying MCC .2072(A) and MCC .8805(B) to its review of this application. MCC .2072(A) provides one way in which the applicant could have obtained a right to proceed with additional construction on its dwelling.

MCC 11.15.2072(A) and MCC 11.ES.2072(A) recognize vested rights under certain circumstances. The County correctly determined that those certain circumstances do not exist for the Fountain Village property.[1]

State law provides protections for projects that have been lawfully commenced but thereafter prohibited by a local zoning ordinance. Case law grants these projects what is called a "vested (established) right" to finish and implement a nonconforming use. This right exists, even absent the adoption of vested rights requirements in the County's land use regulations, to bar county enforcement of new use regulations. *See* Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984). *See also*, Union Oil Company of California v. Board of County Commissioners of Clackamas County, 81 Or App 1, 724 P2d 341 (1986); Rochlin v. Multnomah County, ___ Or LUBA ___ (LUBA No. 98-067)(no retroactive application of laws adopted after issuance of land use permit); Lung v. Marion County, 21 Or LUBA 302 (1991)(use must be lawfully established); DLCD v. Curry County, 19 Or LUBA 237 (1990).

A vested right is an "equitable right" that is determined based upon the facts of each case. The intent of vested rights law is to be fair to an innocent property owner who relied on county land use rules in beginning to establish a subsequently prohibited use. The state court cases cited above provide that counties must consider a number of factors in deciding whether it is fair and proper to allow a partially implemented use to move forward to completion. These factors include the following:

A. The owner must have made substantial expenditures in reliance on the permit. Holmes v. Clackamas County, 265 Or 193, 508 P2d 190, 197 (1973). Substantiality is determined, in part, by weighing expenditures vs. the total cost of the project.
B. Expenditures must be made in good faith.
C. Expenditures must be made before the enactment of the adverse zoning.
D. Expenditures must be directly related to the proposed use. An expenditure is directly related to the proposed use if it is made in contemplation of and in reliance on, a particular development. Union Oil Company, 81 Or App at 6.
E. Expenditures to purchase land are excluded from substantial expenditures. Union Oil Co., 81 Or App at 8.
F. Notice of the proposed change in law by the property owner.

The law of vested rights is consistent with the limits imposed on a county's authority to adopt and apply land use ordinances to existing uses by state statutes. State law prohibits counties from adopting retroactive land use ordinances. ORS 215.110. State law also says that lawfully established uses may continue even after being prohibited by new zoning laws. ORS 215.130(5). ORS 215.428(3) also provides that the law in effect at the time a land use

[1]Both cited code sections require a valid building permit. The County's decision is supported by the applicant's (John Beardsley) testimony that the building permits have expired. Fountain Village does not have and never has had a building permit for the dwelling. All building permits were issued to Robert DeSpain. As building permits are non-transferable under the UBC, Fountain Village acquired no legal rights in the permits when it acquired the subject property.

application is filed with the County is the law that governs permit review. The logical extension of this law is that in a review to determine what rules apply to a use previously permitted by the County, the law in effect at the time of the original permit review is the applicable law.

The County's finding that MCC 11.ES.2072(A) and MCC 11.15.2072(A) provide the only avenues for establishing a vested right to complete the Fountain Village dwelling was in error. The state law protections discussed above are more extensive than those provided by the County code. The applicant is entitled to have the County determine whether its dwelling merits protection under that law, as well as under County code.

Findings: **MCC .8805(B) regarding nonconforming uses applies to review of this application. Vested rights are rights to conduct a nonconforming use even though it has not been fully established. There are no equitable or legal reasons to grant such rights more extensive protections than provided to existing nonconforming uses.**

The County correctly determined that the rules of MCC 11.15.8805(B) that govern nonconforming uses also govern vested rights to conduct nonconforming uses. A vested right is a right to finish establishing a nonconforming use. As stated in the seminal case of Holmes v. Clackamas County, 265 Or 193, 508 P2d 190, 197 (1973):

> "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.' . . . Comment, 22 SC L Rev 833, 839 (1970)."

The Holmes case makes it clear that vested rights may be abandoned once acquired. The Court concluded, however, that the facts of the case showed that the vested rights had not been abandoned.[2] In Union Oil Co., the Court of Appeals also recognized that rights to complete an approved use can be abandoned even before the use is prohibited by the county. In the case of Fountain Village, such a period of abandonment of construction occurred between the end of 1987 and 1991. In terms of remarkable construction, this period extended into 1995.[3] Union Oil Co., 81 Or App at 9.

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[2]The period of alleged abandonment in Holmes was four years. This fact does not mean that Multnomah County must apply a four year grace period to vested rights matters. Holmes did not include a consideration of ORS 215.130 or local ordinances adopted under the authority of ORS 215.130 to establish rules regarding the abandonment of nonconforming uses. Additionally, the Holmes court found that activity had occurred during the four year period, so as to preclude a claim of abandonment.

[3] This statement is based on the applicant's evidence that shows that virtually all work done on the building occurred in 1987. Some limited activity may also have occurred in 1991 and 1993 based on County permit records (building permit renewal and temporary electric

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."[4] 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. According to the Court, "[t]he defendants contend that they had a nonconforming use prior to the adoption of the zoning ordinance." Holmes, 265 Or at 196. 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.

MCC 11.15.8805(B) governs the abandonment and interruption 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.[5] The County must regulate nonconforming uses, including vested rights to nonconforming 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 215.310. 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.

The applicant's attorney claims that the equitable doctrine of laches, not MCC 11.15.8805 nor ORS 215.130, govern the abandonment of vested rights because vested rights are equitable rights. The applicant's attorney cites no legal authority to support this claim and the hearings officer has found no such authority. Nonconforming use rights were originally equitable rights as well and such rights are clearly now governed by MCC 11.15.8805 and ORS 215.130. Furthermore, by adopting ORS 215.130, the Oregon Legislature plainly granted the County the right to limit the equitable rights granted to nonconforming uses, which according to the Holmes court, include vested rights.

The applicant claimed that, as a factual matter, he did not abandon his vested right. This claim was not, however, raised in the Notice of Appeal. As such, it does not provide a legal basis for reversal of the County's decision by the hearings officer. MCC 11.15.8295 (A).[6]

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power). The only other documented period of substantial construction activity, other than 1987, was in 1995.

[4]The applicant's attorney does not provide a citation to any legal case or treatise that supports this argument.

[5] No case or law squarely addressing this issue was submitted by the applicant's attorney or any other party to the proceeding. The hearings officer also did not find any such legal authority.

[6] This issue will need to be addressed by the Board of Commissioners if this decision is appealed to the Board as its rules allow appellants to raise issues not included in the Notice of Appeal.

The facts show, however, that Mr. DeSpain had completed virtually all of the construction that is being relied upon by Fountain Village to establish the vested right was completed by the end of 1987. After 1987, the cabin was left uncompleted and used as a cover for an underground marijuana grow operation. As a result, even if the County erred in applying MCC 11.15.8805(B) to its review of the Fountain Village application, the facts produced in this case support a finding that the applicant's rights were abandoned under the standards of the Union Oil Co. and Holmes cases.

3. *The County erred, factually, in its determination that there is no evidence of work being performed on this structure under a valid building permit.*

Finding: The County did not determine that there is no evidence of work being performed on the structure under a valid building permit.

The applicant does not specify which finding or findings of the County's decision it is referring to in this assignment of error. The hearings officer is unable to locate a finding in the County's decision that concludes that there is no evidence of work being performed on this structure under a valid building permit.

The applicant may be referring to the following finding in paragraph 4: "Permit documents and written narrative provided by the applicant fail to establish that any work was completed on the dwelling between 1987 and 1991." The applicant may also be referring to the quoted finding in paragraph 4 and the findings in paragraph 6 and paragraph 11 that say "[t]he applicant's narrative contains no evidence of work under a building permit beyond February of 1993" (paragraph 6) and "[t]his application contains no evidence showing that work has occurred on the subject structure since February of 1993 (paragraph 11)."

The cited findings, when combined, do not amount to a finding that there is no evidence of work being performed on the structure at any time under a valid permit. The findings relate to discrete time periods that have legal significance in this review. Evidence of specific dates or that the work did not occur later than specified is needed to place evidence in either time frame. The County's findings relate to two time periods and exclude time between 1991 and after February of 1993. In fact, the County's findings determined that there was evidence of work in February of 1993. Finding 6 of the administrative decision said that in February 1993 an inspection was conducted of work performed under the 1991 permit, clearly showing the County did not find there was no evidence of work being performed pursuant to a building permit. As such, the quoted findings are not a finding that there is no evidence of work being performed on the structure under a valid permit.[7]

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[7]At the time the matter was reviewed by the Planning Division, the evidence in the record made it unclear whether Mr. DeSpain had completed substantial expenditures after issuance of the building permit. The evidence showed that work had occurred prior to the issuance of permits and failed to separate that work from all work completed prior to 1993. Exhibit 1 included a permit that indicated that Mr. DeSpain was building a log cabin without a permit and that a stop work order was issued.

4. *The applicant generally agrees with Findings 1, 2, 3, 5, 7 and 8, as contained within the decision.*

Finding: **This paragraph of the applicant's Notice of Appeal does not include any assignment of error and, therefore, does not require discussion in this decision.**

5. *The applicant does not agree with Findings 4, 6, 9, 10, 11, 12 and 13, or the conclusion reached by staff, as contained within the decision.*

Finding: **This assignment of error does not state legal grounds for reversal. It also does not comply with the requirements of MCC 11.15.8295.**

The fact that the applicant does not agree with certain findings or the conclusion reached by staff is not a basis for reversing the decision. The County's appeals provisions also clearly require the applicant to specify the legal basis for it objections. The hearings officer's review authority is limited to the "specific grounds" stated in the Notice of Appeal. MCC 11.15.8295(A) & (C). As a result, this assignment of error does nothing to add to the more specific allegations of error listed and addressed above.

Conclusion

Based on the foregoing findings, the hearings officer concludes that the County's administrative decision must be **AFFIRMED**.

DATED this 11th day of January 2000.

Liz Fancher, Hearings Officer

Attachments: Exhibit List
Discussion of Vested Rights Claim

Appeal to the Board of County Commissioners:

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An Appeal requires a completed "Notice of Review" for and a fee of $500.00 plus a $3.50 - per- minute charge for a transcript of the initial hearing(s) [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)]. Instructions and forms are available at the County Planning Office at 1600 SE 190th Ave., (in Gresham) or you may call 248-3043, for additional instructions.

DISCUSSION OF VESTED RIGHTS CLAIM

Fountain Village Development

This discussion is provided to assist the Board of Commissioners in addressing the applicant's vested rights claim on appeal. This issue will be relevant if the Board determines that vested rights are subject to loss due to abandonment or interruption or have not been lost under the facts of this case.

Facts

The subject property is currently a 2.96-acre lot. In 1986, it was a 36-acre lot known as Tax Lot 3. In 1986, Tax Lot 3 was enlarged to 38.07-acres in size as the result of a lot line adjustment (Exhibit 5).

On November 19, 1986, Robert DeSpain purchased Tax Lot 3 from Earl and Fern Wecks by land sale contract. On the same date, a two-acre portion of Tax Lot 3 was illegally conveyed to Mr. DeSpain by warranty deed.[1] Tax Lot 3, including the two-acre parcel, was developed and used by Mr. DeSpain and others as the site of a marijuana grow operation. A bunker was built on the two-acre parcel by Mr. DeSpain and others. The bunker was covered by dirt and used to grow marijuana.

On January 1, 1987, Mr. DeSpain sold the two-acre parcel and his contract purchaser's interest in the remainder of Tax Lot 3 to William A. Clayton by land sale contract. In such a sale, Mr. DeSpain retained the legal ownership of the property but Mr. Clayton had the equitable ownership of the property and the exclusive right to possess and use the two-acre parcel.

Mr. DeSpain began construction of the log cabin on top of the bunker at some time prior to February 25, 1987 without first obtaining building permit approval. A stop work order was issued on February 25, 1987. Building permit records state that Mr. DeSpain was building a log cabin without a permit at the time construction was stopped. According to Mr. DeSpain, forms had been laid for the foundation at the time the stop work order was issued but the cabin had not been built.

On March 10, 1987, Mr. DeSpain obtained a building permit authorizing construction of the building on Tax Lot 3. At the time, the law allowed a single family dwelling on a 38-acre minimum lot as a use permitted outright. The law also provided that in cases where a building permit is required under the Building Code, "it shall be deemed to be a Land Use Permit." MCC 11.15.8715.

At the time the building permit was issued, the law required Mr. DeSpain to obtain the approval of the Oregon State Park and Recreation Department because the subject property was and is

[1]The conveyance was illegal as the two-acre lot was not lawfully created as a separate lot prior to its conveyance.

located within the state's Scenic Waterways System. *See* ORS 390.805 to 390.925. The applicant has not proven that this required permit was ever obtained.

The County Planning Division initialed the 1987 DeSpain building permit, indicating that no land use review of the use was needed. The County's sign-off was in error as the law in effect in 1987 required a land use review to determine compliance with the discretionary siting criteria of MCC 11.15.2194.

Ms. Wall's affidavit states that the log cabin structure was constructed in 1987 after issuance of the building permit. According to Ms. Wall, Mr. DeSpain said that $70,000 was spent by someone toward construction of the cabin in 1987.

In a deed dated June 11, 1990, Earl and Fern Wecks conveyed the remainder of their interests in Tax Lot 3 to Robert DeSpain (seller's interest in all of Tax Lot 3, except for the illegal 2-acre lot).

In a deed dated October 18, 1990, Mr. DeSpain conveyed his ownership of the illegal two-acre parcel to Jimmy A. Pearson by a bargain and sale deed. This deed was not recorded until July 2, 1992. The deed transferred all of Mr. DeSpain's interest in the property to Mr. Pearson. At the time, Mr. DeSpain held the contract seller's interest in the property (legal title, subject to right of Mr. Clayton to possess and obtain title to the property upon full payment of the purchase price).

On April 12, 1991, Mr. Clayton quitclaimed his contract purchaser's interest in the two-acre illegal parcel to Mr. DeSpain. As a result of this transaction, Mr. DeSpain obtained the contract purchaser's rights in the property (equitable, but not legal owner - right to possess and develop the property). Mr. DeSpain's interest in the two-acre illegal parcel did not pass through to Mr. Pearson, however, because the bargain and sale deed given to Mr. Pearson did not contain a warranty of after-acquired title.

On April 15, 1992, 130 marijuana starter plants and a grow light were found and seized from the log home and/or the bunker. Other growing apparatus and plants had been on the property but had been removed on April 14, 1992.

On August 20, 1992, the subject property and cabin were seized by the United States Marshals Service for the District of Oregon because the property had been purchased with funds earned from trafficking in illegal drugs.

In November of 1992, Jimmy A. Pearson quitclaimed his interest (contract seller) in Tax Lot 3, including the two-acre parcel, to the United States of America.

In December of 1992, the United States of America quitclaimed Pearson's seller's interest in Tax Lot 3 to Multnomah County.

On January 7, 1993, Multnomah County changed the zoning of the subject property from MUF to CFU. This change required any single family dwelling to obtain conditional use approval from the County. Shortly thereafter, Multnomah County conveyed Pearson's interest in Tax Lot

3, including the two acre parcel, to Robert DeSpain. Robert DeSpain conveyed the illegally created two-acre parcel to Daniel N. DeSpain. Daniel DeSpain conveyed the two-acre property to Waterford Associates in April 1993.

In April 1993, Fountain Village Development Co. obtained ownership of all of Tax Lot 3, other than the two-acre illegally created parcel, from Robert DeSpain for $100,000. On June 28, 1994, Waterford Associates conveyed the two-acre property and log cabin to Fountain Village Development Co. by warranty deed for $25,000.[2] The applicant has not explained why Mr. DeSpain would have sold the two-acre property and cabin for a mere $25,000 when Mr. DeSpain or some person had spent about $70,000 on improvements for the cabin in 1987.

On June 28, 1994, Fountain Village sold Tax Lot 3, less the illegal two-acre parcel, to Hambleton Brothers Lumber Company for $127,000. This transaction, and all prior transactions that conveyed a part of Tax Lot 3 were illegal. Tax Lot 3 was a single lawfully created lot. In order to lawfully divide and transfer parts of the lot, partition approval from the County was required. ORS 92.016 & 92.025.

Parcel 3, including the illegal two-acre parcel, and an adjoining 38.22-acre tax lot previously owned by Mr. DeSpain's criminal associates received lot line adjustment approval from Multnomah County in 1994. This lot line adjustment created the 2.96-acre parcel that is the subject property of this land use application and a 73.43-acre parcel. In order to approve the lot line adjustment, the County was required to find that the permitted number of dwellings will not be increased by the lot line adjustment above the number allowed by the zoning district. In making that determination, the County planner opined: "Tract 2 [the proposed 2.93-acre lot] . . . presently has one dwelling located on Tax Lot 23 [the illegally created two-acre parcel] and either before or after the proposed Property Line Adjustment, the total number of dwellings permitted on Tract 2 is one." The planner's finding was in error as the log cabin was originally permitted as a single family dwelling on a lot of 38 acres or larger and approval of the lot line adjustment deprived the dwelling of a key part of the use -- the required 38-acre parcel size.

At the land use hearing, the applicant's attorney Jeff Condit argued that the vested rights status of the residence itself was not the issue in the lot line adjustment matter. In later written arguments, Mr. Condit argued that the lot line decision determined this issue and that any decision to the contrary would be a collateral attack on the 1994 lot line decision.

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.

[2]The property was conveyed subject to a $5,000 lien in favor of Robert DeSpain and accrued property taxes.

Beardsley cleaned bushes, replaced broken glass in windows and made sure that the roof was sound over time, between his acquisition of the property and the present day. No major efforts to complete the home have, however, been made since 1995.

Discussion of Issues

1. In order to qualify for a vested right, the expenditures must be directed to establishing a lawfully approved use – the construction of a single-family residence on a 38-acre tract of land. Expenditures that also apply to other uses are not counted when making a vested rights determination.

   The evidence in the record indicates that the primary purpose of Mr. DeSpain's expenditures for the log home were intended to facilitate the commission of a crime: the growing of marijuana. The placement of much of the log home on top of the bunker allowed the home to serve as a part of the grow operation and as a cover for criminal activities on the property. The cessation of construction in 1987, prior to completion, indicates that the home was not intended to serve as a single-family residence. Otherwise, it would have been logical to have completed construction long before 1993, so it could be used for that purpose. Five years is more than ample time to complete a single-family residence.

   The applicant has offered no explanation why the home would be allowed to sit unfinished. Leaving the home unfinished obviated the need for periodic building inspections and lowered the risk of discovery of the grow operation. That purpose plainly won out over the intent, if any, to establish a single family home on the property.

2. The applicant has failed to establish that Mr. DeSpain obtained all legal approvals needed to construct his home, an element of establishing a vested right claim. There is no proof that Mr. DeSpain obtained land use approval demonstrating compliance with the County's forest zone siting standards. There is also no proof that the required scenic waterways permit was obtained from the State of Oregon.

3. Mr. DeSpain's failure to obtain forest siting review approval may be excused by the rule that prohibits collateral attacks on land use decisions. *See* discussion in Item 9, below. By reviewing the building permit and determining that no land use laws applied to the review, the County arguably made a land use decision. To make a contrary determination at this time could be viewed as a collateral attack on that implied, unwritten determination.

4. Multnomah County's building permit process did not require Mr. DeSpain to demonstrate that he had obtained a state scenic waterways permit. The County had a practice of asking for this information but there is no evidence in the record to show that this was a precondition in the County's code for permit issuance. Furthermore, the State of Oregon was not notified of the application and, therefore, had no opportunity to object to the issuance of a building permit in violation of the scenic waterways law (no permit). A state waterways permit is not issued by the County and compliance with waterways law

is the responsibility of the State that is determined in a separate legal proceeding, not in the land use review process. *See* Doney v. Clatsop County, 142 Or App 497 (1996)(City had opportunity to object to proposed access in a County site plan review but failed to do so; could not do so later).

5. The Holmes case requires that substantial expenditures be made toward establishing the nonconforming use prior to the time the use is prohibited or changed to a conditional use. It is clear that the expenditures made by some person[3] are substantial enough to qualify for a vested right. This fact alone, however, does not establish a vested right.

6. The right that vested in 1987, if a right vested at all, was the right to construct a single family dwelling on a 38-acre lot. A single family dwelling on a smaller lot required conditional use approval in 1987.

7. The deeds and title evidence presented by the applicant indicate that Mr. DeSpain held the right to possess and develop the subject property in January 1993 when the zoning of the property was changed to CFU from MUF. Multnomah County held the contract seller's nonpossessory ownership interest (legal title as security for sales agreement). This is the point in time that vested rights could possibly have existed as the very nature of the vested right is the fact that the use must be nonconforming. Until January 1993, the use was allowed outright by the MUF zoning district (single family residence on a 38-acre lot).

8. The County should consider whether its 1994 lot line decision determined the legal status of the single family dwelling. This is a close question but it appears to the hearings officer that it did not. The legal requirement in question merely required that no additional dwellings be allowed to be created as a result of the lot line adjustment, not that dwellings on the property being adjusted be lawfully established.

9. If the County's 1994 lot line decision determined the legal status of the Fountain Village log home, the County must decide whether it is bound to honor that determination in this proceeding. Oregon case law contains bodies of law on this issue: laws prohibiting collateral attacks and decisions holding that collateral estoppel (issue preclusion) does not apply in local land use proceedings.

   Collateral Attack. Case law prohibits collateral attacks on earlier quasi-judicial or legislative land use determinations. This rule is most frequently invoked in cases of multiple appeals of a single land use action and in cases where a party is attacking a final legislative determination, such as a prior establishment of an urban growth boundary. A handful of cases also apply the collateral attack rule in the setting of separate, quasi-

[3]Laurie Wall's affidavit of her conversation with Mr. DeSpain does not say who made the expenditures for the log cabin. Mr. DeSpain did not have the legal right to possess and develop the property between March 10, 1987 and the end of 1987 as he had sold the property to Mr. Clayton. It, therefore, is not safe to assume that it was Mr. DeSpain who made the expenditures in question.

judicial land use cases. Rochlin v. Multnomah County, ___ Or LUBA ___ (LUBA No. 99-025, 11/24/99)(lot line adjustment approved in earlier proceeding; effect was to alter a previously approved farm management plan; in subsequent proceeding to confirm validity of plan opponents could not challenge lot line adjustment's impact on farm plan); Doney v. Clatsop County 142 Or App 497, 921 P2d 1346 (1996)(access issue could have been raised and resolved in site plan review so can't raise later); State ex. rel. J.C. Reeves Corp. v. City of Portland, 131 Or App 578, 886 P2d 1095 (1994)(developer precluded from challenging condition of approval in prior land use approval in a later, separate land use proceeding). The cited case law decisions are rendered on facts that are the same as those involved in issue preclusion (collateral estoppel) cases. Either rule, when applicable, prevents parties from revisiting issues at issue and determined in prior legal proceedings. The major difference between the two theories, however, is outcome. In collateral attack cases proponents prevail on the same facts that would merit denial if the claim raised were issue preclusion (collateral estoppel). *See* discussion below.

In the case of the 1994 lot line decision, the law against collateral attack would hold that it is inappropriate for the County to determine that the 2.96-acre lot created by the lot line adjustment is illegal. It is not equally clear, however, that County is bound to find that the partially constructed 38-acre or larger lot dwelling is entitled to be completed on the lawfully created 2.96-acre lot as the lawful establishment of the house was not a requirement in the lot line proceeding. The reason this is so is that it was not necessary for the County to determine that the single-family home on the 2.96-acre parcel was a lawful dwelling. Instead, the County was required to determine that the house was not a hardship or farm/forest help dwelling and that the number of homes potentially allowed on the properties, once parcels had been adjusted, would not be greater than allowed prior to the adjustment. The County's conclusion regarding the existing house was, essentially, a finding that the house was in existence and no other houses could be built on the lot.

Issue Preclusion (Collateral Estoppel).

The legal theory of issue preclusion prevents parties to a prior proceeding from revisiting and relitigating issues at issue and determined in prior proceedings. Issue preclusion is only applicable in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. Marquam Farms Corp. v. Multnomah County, 147 Or App 368, 936 P2d 990 (1997)(Court refused to find that County's prior approval of site plan for 50-dog kennel in 1990 determined that property owner had right to a 50-dog kennel use of its property under nonconforming use provisions of County code); Fisher Broadcasting v. Department of Revenue, 321 Or 341, 347, 898 P2d 1333 (1995); Alliance for Responsible Land Use v. Deschutes County, 33 Or LUBA ____ (LUBA No. 96-145 & 96-146, 3/14/97).

LUBA has found that the land use system "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." Nelson v. Clackamas County, 19 Or LUBA 131, 140 (1990); *cited with approval in* Femling v. Coos County, 35 Or LUBA ____ (LUBA No. 97-176, 4/9/98). Instead,

LUBA "reviews land use decisions for compliance with relevant approval standards, [and] it does not matter whether the challenged decision is consistent with prior decisions, if those prior decisions applied incorrect interpretations of the applicable approval standards." Marquam Farms Corporation v. Multnomah County, 32 Or LUBA ____ (LUBA No. 95-254, 12/5/96).

10. If the Board finds that the rules of collateral attack and issue preclusion apply and also finds that the 1994 lot line decision determined the legal status of the cabin, this does not end the Board's 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 interruption 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 interrupted for a period of more than two years. The evidence shows that Fountain Village 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.

11. The fact that a cabin use can be intermittent does not require the County to apply a longer period of abandonment than provided by County law (two years). Cabins are typically used on annual (seasonal) basis in an intensive manner. The record shows that construction occurred in two bursts of intense activity: in 1987 and in 1995. No other construction activity to complete the cabin has been undertaken since 1995. Furthermore, the use approved by the County was a single family residence on a 38-acre tract, not a vacation cabin. A single-family dwelling is not typically an intermittent use. *See* Tigard Sand and Gravel, Inc. v. Clackamas County, 149 Or App 417, 943 P2d 1106, 1109 (1997)(intense gravel operation lost due to one-year abandonment rule when activity becomes minimal and nonexistent during seven-year period between periods of intense operations).

12. The only permits issued for the construction of the residence have expired by their own terms. The Board should consider whether the fact that the permit that is claimed to be a land use permit by the applicant has expired affects the applicant's right to claim a vested right. *See*, Heidgerken v. Marion County, ___ Or LUBA ___ (LUBA No. 98-090, 11/13/98).

13. The applicant's attorneys argue that because the procedural rules and rights that apply to cases brought in courts of equity are unavailable in a land use forum, the County must apply a lower burden of proof to its case review. A similar claim, based on the difficulty of obtaining evidence in the land use arena for old, nonconforming uses was rejected by LUBA in the case of Fraley v. Deschutes County, 32 Or LUBA ____ (LUBA No. 96-092, 9/20/96). LUBA reasoned as follows:

> Nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation. Clackamas Co. v. Port. City Temple, 13 Or App 459, 462, 511 P2d 412, *rev den* (1973). One who claims a nonconforming use bears the burden of proving

the facts upon which the right to such a use is based. Webber v. Clackamas County, 42 Or App 151, 154, 600 P2d 448, *rev den* 288 Or 81 (1979). Although it may be more difficult in most cases to establish the nature and extent of a use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it. We do not minimize the difficulty petitioner faces in establishing the nature and extent of a use that existed on the subject property on February 13, 1973, and in the years thereafter, particularly when many different businesses have occupied the property since 1973. Nevertheless, that is what ORS 215.130 and DCC 18.120.010.A require petitioner to do.

14. Applicant's attorneys claim that the abandonment issue is an affirmative defense because it was an affirmative defense when vested rights cases were determined by circuit courts rather than local governments. They claim it, therefore, is the County's obligation to show that the vested right was, in fact, abandoned or interrupted. This argument is undercut, however, by the holding of Marquam Farms Corp. v. Multnomah County, 147 Or App 368, 936 P2d 990 (1997) that a decision recognizing a nonconforming use must contain findings supported by substantial evidence in the record to establish continuity of use. Otherwise, it is not proper for the County to recognize the use. This is consistent with LUBA's reasoning in Fraley, quoted above.

Recommendation

DENY the application unless new facts are submitted to materially alter the facts already in the record.

REASONS:

1. Mr. DeSpain's expenditures for the cabin were not made for the legal purpose of establishing a lawful, single-family dwelling. Instead, the expenditures were made to facilitate an illegal marijuana grow operation.

2. The evidence in the record supports the County's finding that the single-family use were abandoned. All expenditures relied on by Fountain Village to establish the vested right claim were made in 1987. The use was not prohibited until 1993. Fountain Village 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.

3. The only vested right that can be claimed by the applicant under the facts of this case, under any circumstance, is a right to construct a single family dwelling on a 38-acre or larger lot. It is impossible for the applicant to move forward with that use as he voluntarily conveyed all but 2.96 acres of the 38+ acre lot on which the cabin was originally sited.

4. The County is not prevented from raising the 38-acre lot issue now due to the 1994 lot of record determination. The 1994 case did not determine whether the log cabin was a lawfully established use nor did it hold that the property owner had a vested right to finish the cabin. If the County finds the lot line case did determine that the log cabin was a lawful, existing single family dwelling, the county must apply the abandonment rules of MCC 11.15.8805 and ORS 197.130 to the use. The facts show that Fountain Village abandoned its attempts to complete the cabin for over two years.

5. 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.

6. Fountain Village purchased the 2.93-acre property and cabin for $25,000 in 1994. This indicates that Mr. DeSpain's expenditure figures are grossly inflated, that the improvements had been allowed to go to waste (showing abandonment) or that Fountain Village bought the cabin for a significant discount based on the history of the property and the change in forest zone law. All such scenarios weaken the applicant's vested rights arguments that are based on fairness to innocent landowners.

7. The applicant has not demonstrated that all permits needed to lawfully establish the use were obtained. Vested rights law requires proof that the use was undertaken in good faith, in accordance with the law in effect at the time. As there is no proof that a waterways permit was obtained, it cannot be said that the applicant's construction was lawful and entitled to equitable protections of vested rights law.

Scope of Review on Appeal to Hearings Officer

Multnomah County's land use procedures ordinance provides strict limits on the ability of the land use hearings officer when reviewing administrative decisions. MCC 11.15.8295(A) clearly states:

> "A hearing before the Hearings Officer on a matter appealed under MCC .8290(A) **shall** be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal."

The hearings officer lacks the ability to expand the scope of review. Smith v. Douglas County, 93 Or App 503, 506-507, 763 P2d 169 (1988)(where ordinance limits scope of review to issues in notice of appeal, failure of local government to confine review to those issues is reversible error). Hearing comments by the hearings officer to the contrary do not overrule the clear provisions of the County's code. Furthermore, the procedures ordinance requires that the hearings officer's decision specifically address the relationships between the "specific grounds"and the relevant approval criteria in rendering a decision. MCC 11.15.8295(C).

The appellant claims the hearings officer's decision (actually the County's code) violates ORS 215.416(11)(a), ORS 197.763 and the Fasano decision by confining review to a resolution of the issues raised by the appellant in the Notice of Appeal. ORS 215.416(11)(a) requires a *de novo* hearing. The appellant argues this means that the scope of review cannot be limited to the issues in the Notice of Appeal. This same claim, made under the City version of ORS 215.416(11)(a) was rejected the Court of Appeals in Johns v. City of Lincoln City, 146 Or App 594, 933 P2d 978 (1997).

In Johns, the Court of Appeals held that the guarantee of a "de novo" hearing on appeal of an administrative decision does not entitle a party to raise issues not listed in the notice of appeal. The Court interpreted the term "de novo" to mean that a plenary hearing must be available, but not to preclude a local government from limiting the hearing to issues contained in the notice of appeal. The Court said:

> "The focal concern of ORS 227.175(10)(a) is with the availability of and opportunity to pursue a hearing. . . . It is important to emphasize that the hearing and appeal contemplated by ORS 227.175(10)(a) do not take place automatically every time a planning director or other official makes an appealable decision of the kind described in the statute. Rather, they occur only if a person entitled to do so exercises the right of appeal defined in the statute. That being so, there is no basis for reading the text of ORS 227.175(10)(a) as precluding local requirements that the issues to be presented on appeal, as well as the fact that an appeal will be pursued, must be specified in advance. The fact that the statute confers a right to a plenary appeal does not mean that any appeal proceeding, or one that is plenary in scope, may be obtained without following applicable procedures for appealing and for defining the basis for the appeal."

The case and statutory authority cited by appellant does not merit a different conclusion. Neither ORS 215.416(11)(a), ORS 197.763, the Fasano decision nor the case of Johnson v. Clackamas County directly address the issue raised by the appellant and resolved by the Court of Appeals in Johns.

MCC 11.15.8290(B)(3) makes it the responsibility of the appellant to list the "specific grounds" for reversal or modification in the Notice of Appeal. As such, the appellant was given complete discretion to frame the issues to be presented to and decided by the hearings officer and was not prejudiced in any way by the requirement.

Finally, it is the County's practice to allow parties to appeals to the Board of Commissioners to obtain a de novo hearing on any issue the parties raise at the hearing or in the notice of appeal. As a result, the appellant will receive the type of hearing he claims he is entitled to receive when he presents his case to the Board.

February 24, 2000

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
(503) 289-2657

Board of County Commissioners
Multnomah County

Re. **MC 13-99—Hearing 3/9/00—Transmittal of Hearings Officer's January 11, 2000 Addendum to the Decision of the Same Date, And Hearings Officer's Memorandum on Scope of Review Received By the Planning Section on February 3, 2000.**

Attached herewith are a photocopy of the hearings officer's 9-page addendum to her January 11, 2000 decision, titled Discussion of Vested Rights Claim, Fountain Village Development, and a printout of an electronic facsimile of an undated 2-page memorandum by the hearings officer, received by the Planning Section on February 3, 2000, titled Scope of Review on Appeal to Hearings Officer.

Though the materials are likely in the Planning Section's file for this case, the applicant/appellant has objected to their submission by the hearings officer and has asked the Board of Commissioners to rule they are not part of the official record of the case. As a precaution against the possibility of rulings in the applicant's favor, I am resubmitting the materials as argument in support of my opposition to the application. As materials submitted by a party on his own behalf, the propriety of including them in the record is not subject to dispute on the grounds raised by the applicant in its objection.

To distinguish my submission from the hearings officer's, I have initialed each page.

Arnold Rochlin

DISCUSSION OF VESTED RIGHTS CLAIM

Fountain Village Development

This discussion is provided to assist the Board of Commissioners in addressing the applicant's vested rights claim on appeal. This issue will be relevant if the Board determines that vested rights are subject to loss due to abandonment or interruption or have not been lost under the facts of this case.

Facts

The subject property is currently a 2.96-acre lot. In 1986, it was a 36-acre lot known as Tax Lot 3. In 1986, Tax Lot 3 was enlarged to 38.07-acres in size as the result of a lot line adjustment (Exhibit 5).

On November 19, 1986, Robert DeSpain purchased Tax Lot 3 from Earl and Fern Wecks by land sale contract. On the same date, a two-acre portion of Tax Lot 3 was illegally conveyed to Mr. DeSpain by warranty deed.[1] Tax Lot 3, including the two-acre parcel, was developed and used by Mr. DeSpain and others as the site of a marijuana grow operation. A bunker was built on the two-acre parcel by Mr. DeSpain and others. The bunker was covered by dirt and used to grow marijuana.

On January 1, 1987, Mr. DeSpain sold the two-acre parcel and his contract purchaser's interest in the remainder of Tax Lot 3 to William A. Clayton by land sale contract. In such a sale, Mr. DeSpain retained the legal ownership of the property but Mr. Clayton had the equitable ownership of the property and the exclusive right to possess and use the two-acre parcel.

Mr. DeSpain began construction of the log cabin on top of the bunker at some time prior to February 25, 1987 without first obtaining building permit approval. A stop work order was issued on February 25, 1987. Building permit records state that Mr. DeSpain was building a log cabin without a permit at the time construction was stopped. According to Mr. DeSpain, forms had been laid for the foundation at the time the stop work order was issued but the cabin had not been built.

On March 10, 1987, Mr. DeSpain obtained a building permit authorizing construction of the building on Tax Lot 3. At the time, the law allowed a single family dwelling on a 38-acre minimum lot as a use permitted outright. The law also provided that in cases where a building permit is required under the Building Code, "it shall be deemed to be a Land Use Permit." MCC 11.15.8715.

At the time the building permit was issued, the law required Mr. DeSpain to obtain the approval of the Oregon State Park and Recreation Department because the subject property was and is

[1]The conveyance was illegal as the two-acre lot was not lawfully created as a separate lot prior to its conveyance.

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located within the state's Scenic Waterways System. *See* ORS 390.805 to 390.925. The applicant has not proven that this required permit was ever obtained.

The County Planning Division initialed the 1987 DeSpain building permit, indicating that no land use review of the use was needed. The County's sign-off was in error as the law in effect in 1987 required a land use review to determine compliance with the discretionary siting criteria of MCC 11.15.2194.

Ms. Wall's affidavit states that the log cabin structure was constructed in 1987 after issuance of the building permit. According to Ms. Wall, Mr. DeSpain said that $70,000 was spent by someone toward construction of the cabin in 1987.

In a deed dated June 11, 1990, Earl and Fern Wecks conveyed the remainder of their interests in Tax Lot 3 to Robert DeSpain (seller's interest in all of Tax Lot 3, except for the illegal 2-acre lot).

In a deed dated October 18, 1990, Mr. DeSpain conveyed his ownership of the illegal two-acre parcel to Jimmy A. Pearson by a bargain and sale deed. This deed was not recorded until July 2, 1992. The deed transferred all of Mr. DeSpain's interest in the property to Mr. Pearson. At the time, Mr. DeSpain held the contract seller's interest in the property (legal title, subject to right of Mr. Clayton to possess and obtain title to the property upon full payment of the purchase price).

On April 12, 1991, Mr. Clayton quitclaimed his contract purchaser's interest in the two-acre illegal parcel to Mr. DeSpain. As a result of this transaction, Mr. DeSpain obtained the contract purchaser's rights in the property (equitable, but not legal owner - right to possess and develop the property). Mr. DeSpain's interest in the two-acre illegal parcel did not pass through to Mr. Pearson, however, because the bargain and sale deed given to Mr. Pearson did not contain a warranty of after-acquired title.

On April 15, 1992, 130 marijuana starter plants and a grow light were found and seized from the log home and/or the bunker. Other growing apparatus and plants had been on the property but had been removed on April 14, 1992.

On August 20, 1992, the subject property and cabin were seized by the United States Marshals Service for the District of Oregon because the property had been purchased with funds earned from trafficking in illegal drugs.

In November of 1992, Jimmy A. Pearson quitclaimed his interest (contract seller) in Tax Lot 3, including the two-acre parcel, to the United States of America.

In December of 1992, the United States of America quitclaimed Pearson's seller's interest in Tax Lot 3 to Multnomah County.

On January 7, 1993, Multnomah County changed the zoning of the subject property from MUF to CFU. This change required any single family dwelling to obtain conditional use approval from the County. Shortly thereafter, Multnomah County conveyed Pearson's interest in Tax Lot

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3, including the two acre parcel, to Robert DeSpain. Robert DeSpain conveyed the illegally created two-acre parcel to Daniel N. DeSpain. Daniel DeSpain conveyed the two-acre property to Waterford Associates in April 1993.

In April 1993, Fountain Village Development Co. obtained ownership of all of Tax Lot 3, other than the two-acre illegally created parcel, from Robert DeSpain for $100,000. On June 28, 1994, Waterford Associates conveyed the two-acre property and log cabin to Fountain Village Development Co. by warranty deed for $25,000.[2] The applicant has not explained why Mr. DeSpain would have sold the two-acre property and cabin for a mere $25,000 when Mr. DeSpain or some person had spent about $70,000 on improvements for the cabin in 1987.

On June 28, 1994, Fountain Village sold Tax Lot 3, less the illegal two-acre parcel, to Hambleton Brothers Lumber Company for $127,000. This transaction, and all prior transactions that conveyed a part of Tax Lot 3 were illegal. Tax Lot 3 was a single lawfully created lot. In order to lawfully divide and transfer parts of the lot, partition approval from the County was required. ORS 92.016 & 92.025.

Parcel 3, including the illegal two-acre parcel, and an adjoining 38.22-acre tax lot previously owned by Mr. DeSpain's criminal associates received lot line adjustment approval from Multnomah County in 1994. This lot line adjustment created the 2.96-acre parcel that is the subject property of this land use application and a 73.43-acre parcel. In order to approve the lot line adjustment, the County was required to find that the permitted number of dwellings will not be increased by the lot line adjustment above the number allowed by the zoning district. In making that determination, the County planner opined: "Tract 2 [the proposed 2.93-acre lot] . . . presently has one dwelling located on Tax Lot 23 [the illegally created two-acre parcel] and either before or after the proposed Property Line Adjustment, the total number of dwellings permitted on Tract 2 is one." The planner's finding was in error as the log cabin was originally permitted as a single family dwelling on a lot of 38 acres or larger and approval of the lot line adjustment deprived the dwelling of a key part of the use -- the required 38-acre parcel size.

At the land use hearing, the applicant's attorney Jeff Condit argued that the vested rights status of the residence itself was not the issue in the lot line adjustment matter. In later written arguments, Mr. Condit argued that the lot line decision determined this issue and that any decision to the contrary would be a collateral attack on the 1994 lot line decision.

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.

[2]The property was conveyed subject to a $5,000 lien in favor of Robert DeSpain and accrued property taxes.

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Beardsley cleaned bushes, replaced broken glass in windows and made sure that the roof was sound over time, between his acquisition of the property and the present day. No major efforts to complete the home have, however, been made since 1995.

Discussion of Issues

1. In order to qualify for a vested right, the expenditures must be directed to establishing a lawfully approved use – the construction of a single-family residence on a 38-acre tract of land. Expenditures that also apply to other uses are not counted when making a vested rights determination.

   The evidence in the record indicates that the primary purpose of Mr. DeSpain's expenditures for the log home were intended to facilitate the commission of a crime: the growing of marijuana. The placement of much of the log home on top of the bunker allowed the home to serve as a part of the grow operation and as a cover for criminal activities on the property. The cessation of construction in 1987, prior to completion, indicates that the home was not intended to serve as a single-family residence. Otherwise, it would have been logical to have completed construction long before 1993, so it could be used for that purpose. Five years is more than ample time to complete a single-family residence.

   The applicant has offered no explanation why the home would be allowed to sit unfinished. Leaving the home unfinished obviated the need for periodic building inspections and lowered the risk of discovery of the grow operation. That purpose plainly won out over the intent, if any, to establish a single family home on the property.

2. The applicant has failed to establish that Mr. DeSpain obtained all legal approvals needed to construct his home, an element of establishing a vested right claim. There is no proof that Mr. DeSpain obtained land use approval demonstrating compliance with the County's forest zone siting standards. There is also no proof that the required scenic waterways permit was obtained from the State of Oregon.

3. Mr. DeSpain's failure to obtain forest siting review approval may be excused by the rule that prohibits collateral attacks on land use decisions. *See* discussion in Item 9, below. By reviewing the building permit and determining that no land use laws applied to the review, the County arguably made a land use decision. To make a contrary determination at this time could be viewed as a collateral attack on that implied, unwritten determination.

4. Multnomah County's building permit process did not require Mr. DeSpain to demonstrate that he had obtained a state scenic waterways permit. The County had a practice of asking for this information but there is no evidence in the record to show that this was a precondition in the County's code for permit issuance. Furthermore, the State of Oregon was not notified of the application and, therefore, had no opportunity to object to the issuance of a building permit in violation of the scenic waterways law (no permit). A state waterways permit is not issued by the County and compliance with waterways law

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6. The right that vested in 1987, if a right vested at all, was the right to construct a single family dwelling on a 38-acre lot. A single family dwelling on a smaller lot required conditional use approval in 1987.

7. The deeds and title evidence presented by the applicant indicate that Mr. DeSpain held the right to possess and develop the subject property in January 1993 when the zoning of the property was changed to CFU from MUF. Multnomah County held the contract seller's nonpossessory ownership interest (legal title as security for sales agreement). This is the point in time that vested rights could possibly have existed as the very nature of the vested right is the fact that the use must be nonconforming. Until January 1993, the use was allowed outright by the MUF zoning district (single family residence on a 38-acre lot).

8. The County should consider whether its 1994 lot line decision determined the legal status of the single family dwelling. This is a close question but it appears to the hearings officer that it did not. The legal requirement in question merely required that no additional dwellings be allowed to be created as a result of the lot line adjustment, not that dwellings on the property being adjusted be lawfully established.

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judicial land use cases. Rochlin v. Multnomah County, ___ Or LUBA ___ (LUBA No. 99-025, 11/24/99)(lot line adjustment approved in earlier proceeding; effect was to alter a previously approved farm management plan; in subsequent proceeding to confirm validity of plan opponents could not challenge lot line adjustment's impact on farm plan); Doney v. Clatsop County 142 Or App 497, 921 P2d 1346 (1996)(access issue could have been raised and resolved in site plan review so can't raise later); State ex. rel. J.C. Reeves Corp. v. City of Portland, 131 Or App 578, 886 P2d 1095 (1994)(developer precluded from challenging condition of approval in prior land use approval in a later, separate land use proceeding). The cited case law decisions are rendered on facts that are the same as those involved in issue preclusion (collateral estoppel) cases. Either rule, when applicable, prevents parties from revisiting issues at issue and determined in prior legal proceedings. The major difference between the two theories, however, is outcome. In collateral attack cases proponents prevail on the same facts that would merit denial if the claim raised were issue preclusion (collateral estoppel). *See* discussion below.

In the case of the 1994 lot line decision, the law against collateral attack would hold that it is inappropriate for the County to determine that the 2.96-acre lot created by the lot line adjustment is illegal. It is not equally clear, however, that County is bound to find that the partially constructed 38-acre or larger lot dwelling is entitled to be completed on the lawfully created 2.96-acre lot as the lawful establishment of the house was not a requirement in the lot line proceeding. The reason this is so is that it was not necessary for the County to determine that the single-family home on the 2.96-acre parcel was a lawful dwelling. Instead, the County was required to determine that the house was not a hardship or farm/forest help dwelling and that the number of homes potentially allowed on the properties, once parcels had been adjusted, would not be greater than allowed prior to the adjustment. The County's conclusion regarding the existing house was, essentially, a finding that the house was in existence and no other houses could be built on the lot.

Issue Preclusion (Collateral Estoppel).

The legal theory of issue preclusion prevents parties to a prior proceeding from revisiting and relitigating issues at issue and determined in prior proceedings. Issue preclusion is only applicable in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. Marquam Farms Corp. v. Multnomah County, 147 Or App 368, 936 P2d 990 (1997)(Court refused to find that County's prior approval of site plan for 50-dog kennel in 1990 determined that property owner had right to a 50-dog kennel use of its property under nonconforming use provisions of County code); Fisher Broadcasting v. Department of Revenue, 321 Or 341, 347, 898 P2d 1333 (1995); Alliance for Responsible Land Use v. Deschutes County, 33 Or LUBA ____ (LUBA No. 96-145 & 96-146, 3/14/97).

LUBA has found that the land use system "is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." Nelson v. Clackamas County, 19 Or LUBA 131, 140 (1990); *cited with approval in* Femling v. Coos County, 35 Or LUBA ____ (LUBA No. 97-176, 4/9/98). Instead,

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LUBA "reviews land use decisions for compliance with relevant approval standards, [and] it does not matter whether the challenged decision is consistent with prior decisions, if those prior decisions applied incorrect interpretations of the applicable approval standards." Marquam Farms Corporation v. Multnomah County, 32 Or LUBA ____ (LUBA No. 95-254, 12/5/96).

10. If the Board finds that the rules of collateral attack and issue preclusion apply and also finds that the 1994 lot line decision determined the legal status of the cabin, this does not end the Board's 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 interruption 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 interrupted for a period of more than two years. The evidence shows that Fountain Village 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.

11. The fact that a cabin use can be intermittent does not require the County to apply a longer period of abandonment than provided by County law (two years). Cabins are typically used on annual (seasonal) basis in an intensive manner. The record shows that construction occurred in two bursts of intense activity: in 1987 and in 1995. No other construction activity to complete the cabin has been undertaken since 1995. Furthermore, the use approved by the County was a single family residence on a 38-acre tract, not a vacation cabin. A single-family dwelling is not typically an intermittent use. *See* Tigard Sand and Gravel, Inc. v. Clackamas County, 149 Or App 417, 943 P2d 1106, 1109 (1997)(intense gravel operation lost due to one-year abandonment rule when activity becomes minimal and nonexistent during seven-year period between periods of intense operations).

12. The only permits issued for the construction of the residence have expired by their own terms. The Board should consider whether the fact that the permit that is claimed to be a land use permit by the applicant has expired affects the applicant's right to claim a vested right. *See*, Heidgerken v. Marion County, ___ Or LUBA ___ (LUBA No. 98-090, 11/13/98).

13. The applicant's attorneys argue that because the procedural rules and rights that apply to cases brought in courts of equity are unavailable in a land use forum, the County must apply a lower burden of proof to its case review. A similar claim, based on the difficulty of obtaining evidence in the land use arena for old, nonconforming uses was rejected by LUBA in the case of Fraley v. Deschutes County, 32 Or LUBA ____ (LUBA No. 96-092, 9/20/96). LUBA reasoned as follows:

> Nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation. Clackamas Co. v. Port. City Temple, 13 Or App 459, 462, 511 P2d 412, *rev den* (1973). One who claims a nonconforming use bears the burden of proving

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the facts upon which the right to such a use is based. Webber v. Clackamas County, 42 Or App 151, 154, 600 P2d 448, *rev den* 288 Or 81 (1979). Although it may be more difficult in most cases to establish the nature and extent of a use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it. We do not minimize the difficulty petitioner faces in establishing the nature and extent of a use that existed on the subject property on February 13, 1973, and in the years thereafter, particularly when many different businesses have occupied the property since 1973. Nevertheless, that is what ORS 215.130 and DCC 18.120.010.A require petitioner to do.

14. Applicant's attorneys claim that the abandonment issue is an affirmative defense because it was an affirmative defense when vested rights cases were determined by circuit courts rather than local governments. They claim it, therefore, is the County's obligation to show that the vested right was, in fact, abandoned or interrupted. This argument is undercut, however, by the holding of Marquam Farms Corp. v. Multnomah County, 147 Or App 368, 936 P2d 990 (1997) that a decision recognizing a nonconforming use must contain findings supported by substantial evidence in the record to establish continuity of use. Otherwise, it is not proper for the County to recognize the use. This is consistent with LUBA's reasoning in Fraley, quoted above.

Recommendation

DENY the application unless new facts are submitted to materially alter the facts already in the record.

REASONS:

1. Mr. DeSpain's expenditures for the cabin were not made for the legal purpose of establishing a lawful, single-family dwelling. Instead, the expenditures were made to facilitate an illegal marijuana grow operation.

2. The evidence in the record supports the County's finding that the single-family use were abandoned. All expenditures relied on by Fountain Village to establish the vested right claim were made in 1987. The use was not prohibited until 1993. Fountain Village 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.

3. The only vested right that can be claimed by the applicant under the facts of this case, under any circumstance, is a right to construct a single family dwelling on a 38-acre or larger lot. It is impossible for the applicant to move forward with that use as he voluntarily conveyed all but 2.96 acres of the 38+ acre lot on which the cabin was originally sited.

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4. The County is not prevented from raising the 38-acre lot issue now due to the 1994 lot of record determination. The 1994 case did not determine whether the log cabin was a lawfully established use nor did it hold that the property owner had a vested right to finish the cabin. If the County finds the lot line case did determine that the log cabin was a lawful, existing single family dwelling, the county must apply the abandonment rules of MCC 11.15.8805 and ORS 197.130 to the use. The facts show that Fountain Village abandoned its attempts to complete the cabin for over two years.

5. 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.

6. Fountain Village purchased the 2.93-acre property and cabin for $25,000 in 1994. This indicates that Mr. DeSpain's expenditure figures are grossly inflated, that the improvements had been allowed to go to waste (showing abandonment) or that Fountain Village bought the cabin for a significant discount based on the history of the property and the change in forest zone law. All such scenarios weaken the applicant's vested rights arguments that are based on fairness to innocent landowners.

7. The applicant has not demonstrated that all permits needed to lawfully establish the use were obtained. Vested rights law requires proof that the use was undertaken in good faith, in accordance with the law in effect at the time. As there is no proof that a waterways permit was obtained, it cannot be said that the applicant's construction was lawful and entitled to equitable protections of vested rights law.

Scope of Review on Appeal to Hearings Officer

Multnomah County's land use procedures ordinance provides strict limits on the ability of the land use hearings officer when reviewing administrative decisions. MCC 11.15.8295(A) clearly states:

> "A hearing before the Hearings Officer on a matter appealed under MCC .8290(A) **shall** be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal."

The hearings officer lacks the ability to expand the scope of review. Smith v. Douglas County, 93 Or App 503, 506-507, 763 P2d 169 (1988)(where ordinance limits scope of review to issues in notice of appeal, failure of local government to confine review to those issues is reversible error). Hearing comments by the hearings officer to the contrary do not overrule the clear provisions of the County's code. Furthermore, the procedures ordinance requires that the hearings officer's decision specifically address the relationships between the "specific grounds"and the relevant approval criteria in rendering a decision. MCC 11.15.8295(C).

The appellant claims the hearings officer's decision (actually the County's code) violates ORS 215.416(11)(a), ORS 197.763 and the Fasano decision by confining review to a resolution of the issues raised by the appellant in the Notice of Appeal. ORS 215.416(11)(a) requires a *de novo* hearing. The appellant argues this means that the scope of review cannot be limited to the issues in the Notice of Appeal. This same claim, made under the City version of ORS 215.416(11)(a) was rejected the Court of Appeals in Johns v. City of Lincoln City, 146 Or App 594, 933 P2d 978 (1997).

In Johns, the Court of Appeals held that the guarantee of a "de novo" hearing on appeal of an administrative decision does not entitle a party to raise issues not listed in the notice of appeal. The Court interpreted the term "de novo" to mean that a plenary hearing must be available, but not to preclude a local government from limiting the hearing to issues contained in the notice of appeal. The Court said:

> "The focal concern of ORS 227.175(10)(a) is with the availability of and opportunity to pursue a hearing. . . . It is important to emphasize that the hearing and appeal contemplated by ORS 227.175(10)(a) do not take place automatically every time a planning director or other official makes an appealable decision of the kind described in the statute. Rather, they occur only if a person entitled to do so exercises the right of appeal defined in the statute. That being so, there is no basis for reading the text of ORS 227.175(10)(a) as precluding local requirements that the issues to be presented on appeal, as well as the fact that an appeal will be pursued, must be specified in advance. The fact that the statute confers a right to a plenary appeal does not mean that any appeal proceeding, or one that is plenary in scope, may be obtained without following applicable procedures for appealing and for defining the basis for the appeal."

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The case and statutory authority cited by appellant does not merit a different conclusion. Neither ORS 215.416(11)(a), ORS 197.763, the Fasano decision nor the case of Johnson v. Clackamas County directly address the issue raised by the appellant and resolved by the Court of Appeals in Johns.

MCC 11.15.8290(B)(3) makes it the responsibility of the appellant to list the "specific grounds" for reversal or modification in the Notice of Appeal. As such, the appellant was given complete discretion to frame the issues to be presented to and decided by the hearings officer and was not prejudiced in any way by the requirement.

Finally, it is the County's practice to allow parties to appeals to the Board of Commissioners to obtain a de novo hearing on any issue the parties raise at the hearing or in the notice of appeal. As a result, the appellant will receive the type of hearing he claims he is entitled to receive when he presents his case to the Board.

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February 24, 2000

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
(503) 289-2657

Board of County Commissioners
Multnomah County

Re. **MC 13-99—Hearing 3/9/00—Vesting**

I oppose the appeal and support the hearings officer's denial.

I. Summary of the Case

The application is for a determination of a vested right to complete a forest cabin dwelling set up in 1985-1986, but never finished. Since then, the property has undergone changes of ownership, including a period of government seizure in 1992 because the property was used to grow marijuana on a commercial scale. A vested right allows implementation of a use that became unlawful or restricted during the course of lawful development. At the point of change of law, the use becomes a nonconforming use obtaining the same privileges, and subject to the same limitations, provided by statutes and regulations applicable to ordinary nonconforming uses.

A fulcrum of the applicant's position is that vesting and nonconforming use are mutually exclusive legal principles. But the position has no support in precedent or reason. Leading Oregon cases treat vesting as just an exceptional entrée to nonconforming use status. Those cases define their issues as involving questions of nonconforming use rights in a manner so casual as to indicate the point was not contested and was beyond argument. The hearings officer and others observed that it would make no sense to place more restrictions on the right to maintain a lawfully established use, than on the right to implement one on which development had only begun. If a party relies on a facially implausible distinction, he must demonstrate it actually exits in law, and the applicant has not.

Clackamas County v. Holmes, 265 Or 193 A(1973) (*Holmes)* is the leading Oregon vesting case. It lays out several criteria relevant to a vesting determination.[1] Not all are significant in every case. The following factors are re-stated to relate them clearly to the significant points of this case:

1. *The land use in which vesting is claimed must be one that was lawfully permitted, or for which no permit was required at the time that efforts toward implementation were made, for which credit toward vesting is claimed.*

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[1] *Holmes* gave the relevant factors in narrative form, without an enumerated list. It's not always apparent what is a separate factor, and what is elaboration of a factor. Later cases and litigants invoking *Holmes* come up with differently enumerated factors.

Vesting is requested in a dwelling on a 2.96 acre forest land parcel. Such a dwelling has been listed as a conditional use since before 1986, when the first activity related to this case began. But no conditional use permit was ever issued.

In 1987, when the first building permit was issued, zoning clearance was given for a dwelling on a 38 acre parcel. Forest dwellings on 38+ acre lots were then uses permitted outright. In 1994, a boundary change decision reduced the subject property to 2.96 acres. That decision made no ruling on the legality of the still uncompleted structure, but was based only on a law requiring that a boundary change not result in any increase in the number of lawfully allowed dwellings. Whether the incomplete and derelict cabin was or was not lawful, was not an issue, and was not addressed in the decision.

The applicant has argued that the significant point in defining the use, is whether the structure has the character of a dwelling. But the code and state law has long distinguished dwelling uses on farm or forest land according to many factors other than whether the structure is designed as a habitation. Size of tracts, quality of soils, relationship of habitation to use of the resource land, and impacts on nearby resource use, have been issues. An otherwise identical dwelling could be allowed outright, prohibited or allowed conditionally. Allowed outright and allowed conditionally are uses for which different applications, procedures and criteria apply. All development efforts before the 1994 lot boundary change can be claimed only toward implementing a 38+ acre dwelling, a use permitted outright before January 7, 1993. They cannot have been directed toward a small-lot dwelling, since the small lot did not exist until 1994 and there has never been the conditional use permit required for a small-lot forest dwelling.

2. *Regardless of the use in which vesting is now claimed, the expenses claimed toward vesting must have been for a lawful use.*

In this case the substantial and more contemporary evidence indicates the purpose of building the cabin in 1985 to 1986 was to cover an underground commercial marijuana growing operation. (See Karamanos Affidavit, page 7 of Exhibit A to complaint in US District Court for Oregon, Civil No. 92-586-BE.) The property was seized by the federal government in 1992.[2]

3. *There must be substantial expenses (relative to total project cost) toward implementing the use in which vesting is claimed. There is no fixed minimum ratio. In one case a 1:47 ratio was held insufficient. In another, a 1:14 ratio was enough.*

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[2] The applicant's counsel argued to the hearings officer, that marijuana was irrelevant, because growing crops is a lawful forest zone use, and the land use law does not distinguish by type of crops. For obvious policy reasons, the Board is not obliged to accept growing marijuana as the growing of crops intended by the land use law. But that aside, the applicant does not understand that vesting is entitlement to a specific use. If he were claiming vesting in growing crops , he would have a better point. But it would be meaningless, since the right to farm in a forest zone isn't disputed. The claim is of vesting in a dwelling, not a farm.

On its face, the unfinished cabin indicates some substantial effort. No one disputes that, were it not for factors other than magnitude, it would be enough to satisfy the ratio test. But those other factors are decisive.

4. *When permits are required, expenses can be counted only if made toward work for which all required permits were in effect when the work was done.*

Building was largely done in 1985 to 1986 (Karamanos Affidavit, page 7.) The first building permit was not issued until March 10, 1987 (following a citation for unpermitted development). Another building permit was issued in 1991. The need for the 1991 permit implies expiration of the first one. Since a building permit expires only for lack of persistent development effort, there were up to 3 or 4 years, when little or no work was done under a permit. The pre-1987 work and an unknown amount of any 1987 to 1991 work was without a permit. And, the record does not establish any significant work after issuance of the 1987 permit, notwithstanding the 1991 permit and a later extension. An electrical inspection does not imply anything significant relative to the scope of the project. The applicant has not carried the burden of proof on this point.

Two other points that work against the applicant are not disputed. First, no conditional use permit was ever issued for a small-lot forest dwelling. Second, the project is in the Sandy River Scenic Waterway area, and a state permit for development in the scenic area was required but never obtained. Therefore, none of the work can have been done under all permits required. The applicant may argue that a county building permit issued pursuant to a zoning clearance, is an authorization, whether correctly issued or not. The argument must fail, because the county zoning clearance and building permit did not purport to relate to the state Scenic Waterway Permit. They could imply only that requirements within the purview of the county were met.

5. *Expenses must be made in good faith.*

This factor concerns whether the owner developed in belief that the finished use would be legal, and was not claiming expenses committed in an attempt to get as much done as possible before a pending change of law became effective. The factor precludes any expenses on or after January 7, 1993, when even a 38+ acre dwelling became a conditional use (no longer permitted outright).

6. *Only the expenses reasonably beneficial for only the lawfully permitted use in which vesting is claimed, can be allowed.*

This principle excludes costs such as the price of land, property taxes, most surveys and other costs that might be incurred to further any land use. Here, costs attributable to a marijuana cover would not be allowed, even if it were just a part of the intended use, rather than being the actual principal purpose as indicated by the evidence.

Finally, the simplest grounds for denial, which are alone adequate, fall under MCC 11.15.8805(B) which implements provisions of ORS 215.130. It provides

nonconforming use rights are lost if a use is discontinued for any reason for more than two years. The conclusions and implications of *Holmes* and other cases are that an unfinished development otherwise qualifying for vesting, is a nonconforming use. And the *Holmes* case itself ultimately turns on whether or not the facts support a conclusion that an unfinished use was interrupted during an alleged period of no development activity. A lack of persistent effort toward implementation for over 2 years is a discontinuance of the use for more than 2 years. As provided by MCC 11.15.8805(B), that ends any vesting in a nonconforming use. The substantial evidence doesn't support any significant development activity from 1987 to 1998. A finding that the applicant did not carry the burden of showing the use was maintained by active development, without a 2-year break from 1987 to 1998 would be correct and adequate grounds for denial.

II. Substantive Grounds in the Notice of Review

The following addresses only the appellant's substantive grounds for appeal, #8, 11, 12, and 14 to 19, in the Notice of Review. (The remaining grounds involve procedural issues, and are addressed later.)

Grounds #8—Did the hearings officer fail to determine vesting rights under the *Holmes* factors or under ORS 215.428(3) as requested by the applicant?

The hearings officer sustained the applicant's claim that staff had erred in not considering an assertion of rights under state law to resume development notwithstanding changes of state and county standards since the last substantial work was done in 1987. Contrary to the applicant's claim, she proceeded to determine that the applicant has no vested rights under state law.

The hearings officer addresses vesting at pages 3 to 7 of the main body of the decision (main body) and in a 9 page addendum to the decision. She expressly considers rights under the *Clackamas County v. Holmes* standards, citing the case and its standards repeatedly.[3] The most critical determinations in the main body are that vesting is a part of nonconforming use law, that ORS 215.130(10) expressly allows counties to define the circumstances under which nonconforming rights are lost by interruption or abandonment, and that under the MCC .8805(B) standard, nonconforming rights were lost when the use was interrupted by discontinuance of significant building efforts since 1987. Vesting by substantial effort directed to implementation of a use is no more than a special means of acquiring nonconforming use rights (which generally apply only to a

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[3] *Clackamas County v. Holmes* is a leading Oregon case on vested rights in unimplemented development. Though vesting law has been refined since 1973, authorities and litigants refer to the *Holmes* factors, even when citing refined versions of the factors, as in *Union Oil Company of California v. Board of County Commissioners of Clackamas County*, 81 Or App 1, 724 P2d 341 (1986). The reason is largely that the refinements are not changes (that is, if *Holmes* were decided today, the outcome would be the same). Rather the refinements result from the particular analyses appropriate to facts significantly different from *Holmes*.

lawfully established use). Consequently, vesting rights can be no more durable than the nonconforming use rights of which they are a subset.

The hearings officer addresses ORS 215.428(3) only briefly at p. 4-5 of the main body. The applicant's arguments under the statute have no apparent merit. The statute provides that in the normal course, an application must be approved or denied based on the regulations in effect when it was first filed. Some case law holds that it preserve rights to the original regulations during the life of an approved permit. Even assuming it applies, the only permits issued in this case were building permits in 1987 and the early 1990's, which have long since expired. Those permits cannot continue to preserve any rights, for two reasons. First, the terms of the Uniform Building Code (UBC) and the Specialty Code, under which the permits were issued, indicate expiration if there was not continuous substantial work for 6 months. (UBC 303(d) and 1990 One to Two Dwelling Specialty Code, R-109.3) Second, the permits are not transferable from owner to owner. It has been nearly 7 years since a "permittee" owned the property. It's the applicant's burden to prove an entitlement, not the hearings officer's to establish that a claim is groundless.[4]

Grounds #11—Did the hearings officer err in concluding the present owner had no legal right to complete the dwelling when it acquired the property?

The applicant misstates the hearings officer's conclusion. She said "As building permits are non-transferable under the UBC, Fountain Village acquired no legal rights in the permits when it acquired the subject property". The significant difference is underlined. The sentence is both a conclusion and an explanation. The hearings officer's statement is part of a succinct analysis at p.4, Note 1. The applicant has not previously claimed that the old building permits were transferred with ownership. If such an extraordinary event were to have occurred, it would be the applicant's burden to prove it.

Since all rights originated with the building permits, the same rights expire with the building permits. During the proceedings, the hearings officer asked the parties to comment on *Heidgerken v. Marion County*, __ Or. LUBA (LUBA No. 98-090, 11/13/98). I expressed doubt about *Heidgerken* for a number of detailed reasons. (The applicant declined to comment.) After re-reading the case, I agree with the hearings officer that it is relevant and dispositive. In *Heidgerken*, even though the owners worked on and off for 14 years to establish a camp ground, when the rights ran out under the original permit and extensions, vesting law could not apply to change the terms of those original permits by extending them. (See decision addendum, p.7, #12.) The principle is directly applicable here. Vesting can give no rights beyond the rights and limits of the permits that were issued. Vesting protects lawfully permitted activity only from regulation changes

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[4] It's ironic that Mr. Grillo assigns error to alleged inadequacy of the findings on vested rights, and at the same time asks the Board to strike the hearings officer's 9 page decision addendum that addresses vested rights in detail. (See Part III, Grounds #9, below.)

adopted while development is in progress. It doesn't enhance permits or resurrect permits that have expired.

Grounds #12—Is the hearings officer's description of the *Holmes* vesting factors inaccurate because it's incomplete?

The hearings officer did not purport to list every factor in *Holmes* or its progeny. She said "These factors include the following" (emphasis added). If an omitted factor were believed relevant and dispositive of some point favorable to the appellant, he should have identified it. I see no relevant omission.

Grounds #14—Was the hearings officer wrong in finding that *Holmes* supports a conclusion that "vested" rights are subject to the nonconforming use rule on interruption or abandonment? If not, did she wrongly find abandonment?

A preliminary point is that the hearings officer acknowledged neither she nor any party found any case law expressly addressing a dispute over whether vested rights can be lost due to interruption or abandonment under nonconforming use law (p.6, Notes 4 and 5). But the case law does indicate that the courts have treated vested rights the same as ordinary nonconforming use rights, different only in being acquired before a use is fully implemented. The disputes in *Holmes* and other vesting cases are characterized by the court as concerning whether or not an owner acquired a vested right in a nonconforming use by virtue of having substantially begun implementation before an enactment restricting or prohibiting the use. And one of the issues in *Holmes* was expressly whether or not alleged cessation of development activity was an interruption causing loss of any nonconforming use right acquired through vesting. The Court decided the point in favor of the owner, but only on the facts, which it held did not indicate interruption. The implication of the court's application of nonconforming use law to vesting, without discussion of applicability, is that it was so apparently correct as to engender no dispute and warrant no discussion.

The hearings officer finds there is no evidence of development activity from the end of 1987 to 1991, and the period without any "remarkable construction" extended to 1995 (p.5). (I believe it actually extended much further, to the commencement of this case.) 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 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.

Grounds #15—Did the hearings officer err in concluding that *Union Oil*, supra, established that vested rights can be abandoned before a use is prohibited by the county?

Union Oil v. Clackamas County did not address the point. The argument made by the appellant was that stopping work for several years, after spending what the county determined to be about $5,000 toward building a gas station, should not be held against it because new federal gasoline allocation rules made it impossible to operate a new gas station during those years. The argument was that the federal allocation rule should be treated as a change of law precluding the development. The court held that the federal rule did not prevent the building of the station, but only created a change of business climate that caused the company to decide to not pursue the opening of a gas station at that time. There was no change of the zoning law. I agree with the applicant, that it should not be inferred that the court approved the notion of interruption or abandonment while an unimplemented use is lawfully permitted. But it did not hold the contrary either. The issue did not arise in *Union Oil* and was not addressed by the court.[5]

That the hearings officer may have erred, does not mean the principle is wrong; just that *Union Oil* doesn't support it. There is nothing in nonconforming use law that says the period of interruption can start only when a use is illegal, and it defies common sense. Suppose in 1900, a metal stamping plant was lawfully built, but the machinery was never installed and the unfinished use held idle. Suppose the site and all surrounding land was rezoned from industrial to residential on January 1, 2000. Suppose a current owner is asking for a right to finish the plant on the basis of vesting in a nonconforming use, arguing he could not have "abandoned of discontinued" the use during the 100 years, because the use didn't become unlawful until a couple of months ago. I believe you would feel comfortable rejecting the claim, and the law would support you. Nonconforming use rights protect uses lawfully in effect when the law changes to restrict them. Vesting is a nonconforming use right obtained by substantial effort toward development to implement such a use that became otherwise restricted or illegal. Cessation of development effort in this context is no different than cessation of use. If there was not continuing substantial development effort at the time of a change of law, the period of discontinuance should be sensibly counted from the last substantial development effort.

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[5] In the case affirmed by the court of appeals, LUBA expressly observed that there was no issue of interruption or abandonment during the development hiatus, because the county did not invoke those grounds for denial. 14 Or LUBA 719, 726 (1986)

Grounds #16—Did the hearings officer err in deciding vested rights are subject to ORS 215.130, and can be regulated no less strictly than the statute allows for nonconforming uses generally? Is the hearings officer supported by *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368 (1997)?

The applicant's assertions implicitly misconstrue the hearings officer's findings. She makes no claim that *Marquam Farms* decided that vested rights are subject to ORS 215.130. First, as discussed under grounds #14 above, the hearings officer correctly concluded that vesting is not independent of nonconforming use rights, but is only a means of acquiring those rights. In *Marquam Farms*, the court held that a county cannot treat nonconforming uses less stringently than provided by ORS 215.130. Since the vesting at issue is vesting in a nonconforming use, it must follow that nonconforming use rights acquired by vesting in an uncompleted use, are subject to the same limits as those acquired in a fully established use.

Grounds #17—Did the hearings officer err in concluding ORS 215.130 "plainly granted" the county authority to limit equitable rights established under *Holmes*?

These grounds challenge what the hearings officer didn't say. The relevant statement at page 6 of the decision is:

> "Nonconforming use rights were originally equitable rights as well [referring to the applicant's description of vesting rights as equitable] and such rights are clearly now governed by MCC 11.15.8805 and ORS 215.130. Furthermore, by adopting ORS 215.130, the Oregon Legislature plainly granted the County the right to limit the equitable rights granted to nonconforming uses, which, according to the *Holmes* court, include vested rights."

There is no claim that the statute directly addressed vested rights. Only that the treatment in *Holmes* (and other cases) of vested rights as being vesting in a nonconforming use, implies that vested rights are nonconforming use rights as provided and limited by ORS 215.130 and local regulations as allowed by ORS 215.130(10).

Grounds #18—Was the hearings officer's conclusion that the cabin was used as a cover for underground marijuana growing wrong, and not supported by evidence? Or, if the cabin was such a cover, is it "relevant to the statutory vested rights test under ORS 215.428(3)?"

Taking the second question first, it is notable that the applicant tacitly admits the issue is limited to ORS 215.428(3), which only preserves the regulations in affect at the time of application, through the permit application process, and, according to some LUBA and court holdings, through the duration of an approved permit. For this argument, I assume the statute applies broadly, through the duration of any approved permits. Even so, ORS 215.428(3) does not apply. The only kind of permits issued for the property are building permits issued in 1987 and 1991,

and they expired long ago, due to a failure to maintain substantial building activity and, because the permits are not transferable. Additionally, the building permits were issued for a use permitted outright in the 1980's and early 90's, that is, a dwelling on a 38+ acre forest tract. A 1994 lot line adjustment reduced the parcel on which the cabin is sited to 2.96 acres. A forest dwelling on less than 38 acres was a conditional use when the building permits were issued for a 38+ acre tract. Thus, under the regulations in effect at the time of issuance of the building permits (which the applicant claims are preserved by ORS 215.428(3)) a dwelling on 38 acres and a dwelling on 2.96 acres are different uses allowed under different criteria and are processed under different procedures. The applicant's own ORS 215.428(3) argument would preclude a determination that there is a right to proceed under the former law, because the use currently proposed was never applied for or approved under any law.

ORS 215.428(3) is not relevant to use of the cabin as a marijuana cover. It is significant that the applicant does not dispute that if the purpose of the cabin was in fact to support the marijuana operation, it would weigh against vesting under *Holmes*.

On the first question, the record includes substantial evidence that the purpose and use of the uncompleted cabin was as a cover for a marijuana growing operation. The evidence may not rise to the criminal law standard of proof beyond a reasonable doubt, but to establish a vesting claim, the applicant must carry the burden of proving that development efforts that are the basis of the substantial commitment factor, must be directed to implementing a lawful permitted use. Opponents, or the hearings officer, need only find the applicant's argument and evidence to be not persuasive. The relevant points are:

1. It is undisputed that the premises were used for growing marijuana in a basement under the cabin and in a large excavated area roofed over and covered with earth at ground level.

2. The US Department of Justice seized the property in 1992. (October 22, 1992 letter from US Marshals Service to County Tax Collection Manager.)

3. The forfeiture was pursuant to a complaint in US District Court (Oregon) in civil case number 92-586-BE. The complaint was supported by an affidavit of Special Agent, Andrew B. Karamanos dated April 28, 1992. It says in relevant part:

> "William Clayton stated that Robert DeSpain, Kelly Martin and he built a 'bunker at 39050 S.E. Gordon Creek Road, Corbett, Oregon in 1985/1986. Once the bunker was completed it was covered up and [sic] log cabin built upon the bunker. DeSpain, Martin and Clayton operated a marijuana grow in this location for about one and a half years before closing it down. The property was originally purchased by Robert DeSpain.
>
> "William Clayton stated the [sic] Jimmy Pearson bought the property at 39050 S.E. Gordon Creek Road, Corbett, Oregon using as a nominee,

William Clayton (Pearson stated on April 23, 1992 that he bought this property with 50 to 60 pounds of marijuana).

"On April 15, 1992 a search warrant was served on the residence and bunker located at 39050 S.E. Gordon Creek Road, Corbett Oregon. Found and seized from this location were over 130 starter marijuana plants, one 1000 watt light, and quantities of marijuana residue. The other lights and marijuana plants (as described by William Clayton) had been removed. A neighbor advised the police that a large rental truck had been by this location the previous day (April 14, 1992), and was at the location a couple of hours, and left in a hurry. On April 26, 1992, Kelly Lee Martin was interviewed. Kelly Martin stated he helped dismantle the grow on Gordon Creek Road on April 14, 1992. Kelly Martin dismantled the grow with the assistance of Robert DeSpain, and several other individuals he would not identify."

The applicant has provided no evidence or analysis that would indicate the contents of the affidavit should not be believed. The quoted statements of participants, supported by the affiant's testimony of what was observed at the site, and supported by the very existence of the unusual subterranean bunker, is substantial evidence by which a reasonable person may be persuaded that the applicant has not carried the burden of proving the partially established use is a lawful dwelling and not a facility supporting a marijuana growing operation.[6]

Grounds #19—Did the hearings officer not address the applicant's claim that there was substantial construction under a valid permit?

She did, to the extent appropriate.

At page 2 of the decision addendum, the hearings officer discusses an affidavit of Laurie Wall (employed by the applicant's attorney) that says (based on an interview with former owner Mr. DeSpain) the cabin was constructed after issuance of a building permit and that Mr. DeSpain said $70,000 was spent by someone toward construction of the cabin in 1987. On page 3, the hearings officer notes that, nevertheless, the whole property, land and all, was sold to Fountain Village Development Co. for only $25,000. She observes the applicant has not accounted for the discrepancy in the amount allegedly spent and the actual property value. Nevertheless, at page 5, point 5, she observes that the level of expenditures is clearly sufficient, but that alone does not establish vesting. Some building permits were issued, but the applicant has not provided substantial evidence of what part of the work was done under valid building permits, and what part was not. It's the applicant's burden. Though not established beyond

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[6] Vesting, which the applicant seeks, is in a use, to which a structure is an adjunct. The point is important, because land use law distinguishes very much among uses, and very little among structures. For example, on land zoned for farming, a large structure to house farm machinery is a use permitted outright. The same structure, if intended to house antique autos, is prohibited or allowed conditionally, depending on other circumstances.

any possible doubt, it is more reasonable to believe most work on the cabin was done before the 1987 building permit was issued (after the owner had been cited for erecting the cabin without a building permit).

The hearings officer observes that, at the time of claimed development, more than a building permit was required for the dwelling. Because of location in a protected area near the Sandy River, a state Scenic Waterways Permit was required. There is no evidence that the owner obtained the required permit or informed the state of the development. The *Holmes* factors of good faith, and that development is done under all permits required, were not satisfied.

The hearings officer also found that the use toward which the applicant asks that development commitment be credited was a dwelling on over 38 acres, a use formerly permitted outright in the forest zone. But the use in which the applicant now wants a determination of vesting is a dwelling on 2.96 acres, a conditional use since the inception of the project. As discussed above, a use is not defined by the nature of a structure, but by the code provisions concerning how and where, and under what relevant circumstances a proposed activity will be conducted.

III. Procedural Issues

This part of testimony addresses only the appellant's procedural grounds for appeal, #1 to 7, 9, 10, 13, 20 and 21, in the Notice of Review and the points in the February 9th letter to the Board from attorney Phil Grillo.

A. Notice of Review

Grounds #1 to 5 and 21—Right to *de novo* hearing was not violated.

All of these purported grounds for reversal involve a claim that by limiting review to the grounds raised in the applicant's notice of appeal of the administrative decision to the hearings officer, the hearings officer violated the applicant's right to a *de novo* hearing as expressly provided by ORS 215.416(11)(a).[7]

ORS 215.416(11)(a) provides a right to a *de novo* hearing on review of a decision made without a hearing. The statute does apply, but the applicant is wrong in saying it isn't satisfied by a review limited to the issues in his own notice of appeal, as long as the contents of the notice were unrestricted.

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[7] 215.416(11)(a) provides:"(11)(a) The hearings officer, or such other person as the governing body designates, may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for appeal of the decision to those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision. Notice of the decision shall be given in the same manner as required by ORS 197.763. An appeal from a hearings officer's decision shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be a *de novo* hearing." (Emphasis added.)

The question is not new. The courts have held that a local procedure that sets a pre-hearing deadline for defining issues is not an infringement of the right to a *de novo* hearing, providing that the appeal is ultimately decided without deference to the first decision. The following quotation from *Johns v. City of Lincoln City,* 146 Or App 594, 598-600, 933 P2d 978 (1997) addresses ORS 227.175(10)(a) (identical to ORS 215.416(11)(a), except it applies to cities rather than counties).

> "The focal concern of ORS 227.175(10)(a) is with the availability of and opportunity to pursue a hearing. In *Tarjoto v. Lane County, 137 Or. App. 305, 309, 904 P.2d 641 (1995)*, we interpreted ORS 215.416(11)(a), the analogous provision applicable to counties, as meaning "that a hearing is not required in the first instance if a *de novo* hearing and a meaningful ability to pursue it are provided for at a later stage of the county process." It is important to emphasize that the hearing and appeal contemplated by ORS 227.175(10)(a) do not take place automatically every time a planning director or other official makes an appealable decision of the kind described in the statute. Rather, they occur only if a person entitled to do so exercises the right of appeal defined in the statute. That being so, there is no basis for reading the text of ORS 227.175(10)(a) as precluding local requirements that the issues to be presented on appeal, as well as the fact that an appeal will be pursued, must be specified in advance. The fact that the statute confers a *right* to a plenary appeal does not mean that *any* appeal proceeding, or one that is plenary in scope, may be obtained without following applicable procedures for appealing and for defining the basis for the appeal.
>
> * * * * *
>
> "Based on the text and context of the statute, we conclude that ORS 227.175(10)(a) does not require that a party must be able to raise any issue at the appeal hearing itself, without advance notification. Further, the statute does not proscribe local legislation requiring a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing. * * *"

Johns justifies rejection of all issues in grounds #1-5 and 21.

Grounds #6—Were the grounds in the applicant's notice of appeal broad enough to encompass all issues?

The hearings officer was required to exercise judgment, and she did so within the bounds of her discretion. Grounds #5 (to the hearings officer) say only "The applicant does not agree with Findings 4, 6, 9, 10, 11, 12 and 13 or the conclusion reached by staff, as contained within the decision." The decision that the grounds fail the MCC .8290(B) specificity test, cannot be said to be wrong. It would have been impossible for the hearings officer to "specifically address the relationships between the grounds * * * and the criteria on which the Planning Director's decision was required to be based * * *", as required by the code.

On the other hand, the staff findings and conclusions in this case are quite succinct with each having very limited scope. I believe I was able to surmise the applicant's unstated points of disagreement.

Though the hearings officer's conclusion is valid, the surest basis for rejecting grounds #6 in this review is that the grounds do not indicate any actual issue that was properly raised before the hearings officer and not addressed. I believe there were none. If that's so, the hearings officer's rejection of some "grounds" is not grounds for reversal.

Grounds #7—The applicant says the hearings officer "admitted" the grounds given for her review were broad enough.

As discussed under #6, Mr. Grillo has not identified any issue that was not addressed by the hearings officer. There being no identified harm from alleged error, there is basis for reversal. Even if there were issues not reviewed, the applicant has not shown that he was prejudiced by the hearings officer's alleged remark, and he was not. "Prejudice" is addressed below under discussion of point 4 of the February 9th Grillo letter, where prejudice is wrongly claimed.

Grounds #9—Should the hearings officer's "advisory" discussion of the vested rights claim (appended to, but not in the main body of the decision) be in the record?

I believe the disputed addendum to the decision is part of the record. But, as a precaution, I submit under separate cover, in support of my own positions, a copy of the 9 pages of vested rights discussion appended by the hearings officer to her decision. There can be no doubt of my right to submit any relevant argument in support of my position. In addition, the following discussion disputes the applicant's argument.

If the hearings officer intended the appended discussion to be part of the decision, then it is certainly properly part of the record before the Board as provided by MCC 11.15.8270(4), which provides for the record to include:

> "The findings and decision of the Planning Commission or Hearings Officer, and the Notice of Review, when applicable."

Findings are no less findings, for being placed after the main body of the decision, than if they were imbedded, or because they are alternative findings in the event the Board should reject the primary reason for denying vesting.

Finally, whether or not the addendum is part of the findings, the hearings officer is authorized to advise the Board outside the decision itself, by MCC 11.15.8115(H). (The applicant's February 9th objections to the hearings officer's memo on scope of review, requires a different response, provided below. The text and meaning of .8115(H) are addressed in that discussion.)

Grounds #10 and 13—The staff and hearings officer did not err in making a determination of whether or not there is compliance with MCC .2072(A) and MCC .8805(B).

These regulations provide respectively, that a property owner can complete a dwelling if a building permit was timely obtained and kept in force, and that there is a right to continue a nonconforming use unless it has been abandoned or discontinued for any reason, for more than 2 years.

The applicant gives no rationale for his claim of error under #10, but under #13, he argues that there should have been no determination under .2072(A) or .8805(B) because the applicant didn't request a determination of vested rights under those local provisions. The applicant mistakenly believes he may exclude relevant approval criteria from consideration by not invoking them himself. The MCC includes those two provisions which conditionally provide for preservation of a right to complete or maintain development which is no longer lawful, which is the essence of the application. The hearings officer could not ignore MCC .2072 and .8805. The applicant makes no challenge to the correct determination that the applicant has not proven any rights under .2072 or .8805. The substance of the hearings officer's rulings therefore stands.

Argument about .2072(A), is an issue without a point. The hearings officer correctly agreed with the applicant that his request for a determination of rights under state law must be considered. She made clear, that any right available under superior state law was not affected by the fact that the benefits requested are not available under a county regulation. In applying state vesting and nonconforming use law, she found the applicant does not have a vested right to complete the development. The determination under .2072(A) had no bearing on the denial under state law. Consideration of .2072(A) did no more than give the applicant an additional and different shot at approval.

MCC .8805(B) does limit nonconforming use rights available under ORS 215.130, by defining abandonment or interruption as a use "abandoned or discontinued for any reason for more than 2 years." But ORS 215.130(10)(b) expressly authorizes counties to adopt standards and procedures "to determine when a use has been interrupted or abandoned."

Grounds #20—Alternative to #9, a blanket objection to all "legal and factual statements made by the Hearings Officer in that [appended] document."

This assertion does not satisfy the requirement of MCC 11.15.8260(B)(3) that grounds identified in the Notice of Review be specific. And, .8270(G) limits the scope of this review to the grounds stated in the notice. The lack of specificity is not a trivial error. It bears heavily on the rights of opponents to prepare rebuttal, by failing to inform them of what claims will be made.

The Board should reject this catchall, and consider no issues not otherwise properly raised.[8]

B. Scope of Review—Hearings Officer Memo Received February 3, 2000 —Grillo Memo Dated February 9, 2000.

The applicant complains bitterly of the hearings officer's memo which he characterizes as a partisan argument. I sympathize with a party who must dispute the analysis of a hearings officer, whose positions are adverse. For reasons given by Mr. Grillo, and other reasons, it likely impairs justice to even have a hearings present at a Board review hearing. Nevertheless, the authority for the hearings officer to appear, or to write the memo at issue, is found in MCC 11.15.8115(H) which provides, as one of the hearings officer's powers and duties:

> "Advise the Planning Commission and the Board concerning any problem comprehended within the powers and duties of the Hearings Officer;"

The scope of the power and duty to advise is broad enough to encompass the challenged memo. Thus, the Board may accept the memo into the record of its review. As with the challenged addendum to the decision, as a precaution, I submit under separate cover, a copy of the hearings officer's scope of review memo as argument supporting my own position.

Because the memo is not part of the hearings officer's decision, it can have no bearing on the 150 day clock, as Mr. Grillo suggests. That is, the opportunity to reply occurs within the BCC proceeding, and not the hearings officer's. (If the memo were a supplement to the decision, it could arguably open a new appeal period and eat into the 150 days; but, it is only post decision discussion.)

Mr. Grillo asserts professional ethics considerations. Compliance with the Bar's disciplinary rules, is beyond the Board's authority.[9] In any case, the allegation is tenuous and requires assumption upon assumption; first that the county is a "client" in the sense intended by the Bar, and second, that the hearings officer's memo is advocacy for a client.

A better argument for the applicant is that the hearings officer's post-decision participation, whether by memo, or appearance at the hearing, burdens an appellant with a moving target. That is, a decision that might be reversible as written, can be bolstered by comments that seem to add to it or revise it. I have

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[8] In McKenzie v. Multnomah County, 27 Or LUBA 523 (1994), LUBA sustained the right to raise issues under similar broadly worded grounds for appeal. But the situation was extraordinary. The former planning director had issued a notice of decision with no findings, but a standard appeal deadline. The appeal notice therefore challenged compliance with all applicable criteria. (Findings were not issued until two weeks after the appeal deadline.)

[9] If there were a charge of inherently evil conduct, such as bribery, it would not be beyond the Board's scope of consideration because if would violate more than ethics rules. But, the charge in this case involves technical interpretations, which might arguably involve technical violations.

more than once experienced the seeming transformation of a decision when a different hearings officer glossed over problems and emphasized facts and arguments selectively, when addressing the Board. When a hearings officer is defending a decision, the objectivity of a judge can no longer be presumed. These problems, however, do not mean anything done by the hearings officer is illegal, or that her memo cannot be accepted into the record. But, it's human nature, inherent in even the most capable and fair-minded person, to prefer public vindication, over public rejection by an employer. What the Board hears from a hearings officer may be colored by instinctive defense of a personal opus under public attack. At the same time, the role the Board assigns to a hearings officer at an appeal hearing, evokes a demeanor of dissociation from the earthly fray. (In the future, a compromise on appearance at a review hearing may be to have the hearings officer appear only to answer specific questions with an opportunity for cross-examination by parties.)

Concerning the merits of the applicant's new arguments only:

As a preliminary matter, the applicant rejects the aptness of a court decision because its holding is "limited to its facts". Every authority is so limited. The value is in providing legal guidance for resolving disputes that are sufficiently similar or analogous.

Points are enumerated as in the applicant's February 9th memo:

1. That the appellants in *Johns v. Lincoln City* were opponents and not applicants, is a distinction without relevance to any applicable law. Bearing the burden of proof is not an issue relevant to the right to a *de novo* hearing under ORS 215.428(11)(a).

2. The claim that the hearings officer considered all of my testimony, has no significance. I intended my testimony to address only issues on review. Mr. Grillo does not cite any instance where it does not, or, more important, where the hearings officer considered improper testimony. If such testimony had been considered, Mr. Grillo would have been free to object in his notice of review for this appeal. He did not, and the Board is barred by MCC 11.15.8270(G)[10] from considering the issue.

3. Concerning the claim that vesting was not given the consideration justified by the grounds given in the notice of appeal, the issue was adequately addressed by the hearings officer at pages 3 to 7 of the decision. Further, appreciating the critical importance of the issue to the applicant, her 9 page addendum addressed additional vesting issues that do not have to be reached in the main body, because of denial on other vesting grounds. The substance of the applicant's claim was raised in the notice of review under grounds #10, and is addressed

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[10] MCC 11.15.8270(G): "Review by the Board, if upon Notice of Review by an aggrieved party, shall be limited to the grounds relied upon in the Notice of Review under MCC .8260(B) * * *."

above in the discussion of grounds #10 and 13. Briefly, rejection of the vesting claims was based on substantive law, and not on inadequacy of the notice of appeal.

4. Mr. Grillo claims the hearings officer prejudiced a right by saying in a hearing that the applicant's first ground for appeal was broad enough to encompass all of the applicant's vesting issues. It's not necessary to determine what the hearings officer said, and what she was referring to, because the prejudice claim fails. Resulting prejudice is alleged to be that failure to put the applicant on notice of deficiencies in the notice of appeal, or encouraging him to believe there were no deficiencies, induced the applicant to forgo opportunity to amend the notice of appeal, and thereby cure all problems.

There was no opportunity to amend the notice of appeal. The deadline for filing the notice was November 8, 1999, before the first hearing. An amendment to a notice of appeal is no different in law from filing a new notice of appeal, which must comply with the MCC deadline, and which could not be accepted by the county after that deadline. MCC .8290(D)(1) provides that missing the deadline is a "jurisdictional defect and shall preclude review by the Hearings Officer." In *Johns v. Lincoln City*, the court of appeals observed in Note 2, concerning what action might be taken on remand: "Because the time for an appeal under section 9.040 has passed, the city's determination must be based on the documents [notices of appeal by 2 parties] that have already been filed."

5. This party agrees with the applicant that he was not surprised (in a legal sense) or prejudiced by any of the applicant's arguments. I was able to reasonably surmise the applicant's intended points of attack on the decision. However, there is no issue not addressed in the decision, that could have altered the reasons for denial. The hearings officer's rulings on scope are legally supportable. When the appellant gives as grounds for appeal: "5. The applicant does not agree with Findings 4, 6, 9,10, 11, 12 and 13, or the conclusion reached by staff, as contained within the decisions" he invites rejection for non-compliance with MCC 11.15.8290(B)(3), which requires "The specific grounds relied on for reversal or modification of the decision." That I was able to guess what the applicant disliked about the decision, does not mean there was compliance with the code. That the applicant's problems with scope of review are of his own making is demonstrated by the incongruous fourth grounds for appeal: "4. The applicant generally agrees with Findings 1, 2, 3, 5, 7 and 8, as contained within the decision." Whatever useful purpose that may serve, it is not "grounds for reversal", as the hearings officer was required to point out. The hearings officer's decision adequately addresses the significant grounds and provides a firm basis for denial.

6. The applicant argues that numerous questions raised by the hearings officer, most in writing, expanded the scope of review. The argument is flawed. First, the applicant has not identified any issue raised by the hearings officer outside the scope of her review. Second, LUBA has often held that it does not reverse on the basis of purported misperceptions of law or fact during a proceeding, but only on

the basis of errors actually affecting, or found in, the final decision. Whether or not the hearings officer asked questions that could be judged outside the scope, is not a basis for reversal if they did not demonstrably and improperly color the final decision. Mr. Grillo inaptly cites Note 1 in the *Johns v. Lincoln City* decision as indicating the court did not address the question of the Lincoln City decision maker's authority to expand the scope of review on its own. But the question can't arise in Multnomah County, where, unlike Lincoln City, the code expressly limits issues to those raised in the notice of appeal.

7. The applicant selectively cites the provision of MCC 11.15.8270(F) that defines *de novo* hearing as being "as if no decision had been rendered". He omits the text immediately following "except that all testimony, evidence and other material received by the Planning Commission or Hearings Officer shall be included in the record." And he disregards that 11.15.8295(A) limits the review to the issues in the notice of appeal. The meaning of *de novo* in this county is not derived from a single phrase out of context, and the context makes it clear that *de novo* here, means only a hearing in which the outcome is not to be influenced by the outcome of the administrative proceeding. Even some court reviews where no new evidence is allowed, are considered *de novo* if the initial decision need be given no deference. The essential distinction is that in a *de novo* review, there is no need to identify errors as such. It's sufficient for the court to take a different view of the evidence or law without finding a prior decision maker to have been out of bounds. Other discussion of the issue is under grounds #1-5 and 21 above.

8. Again addressing the grounds in the notice of appeal, the applicant calls for liberal interpretation. A problem with the specific argument is that it calls for special treatment of appellants who are applicants, because they bear the burden of proof. Burden of proof and the requirement to specify grounds for appeal, have nothing to do with each other. The argument would be more persuasive if amended to be less self-serving. I would agree the requirement to state the grounds for appeal should be interpreted as liberally as possible. The purpose of an appeal is to correct perceived errors. The more actual errors corrected, the better. Therefore, the fewer barriers to adjudication of allegations of error, the better, as long as all parties have adequate time to know and argue the issues. But that's a policy position, not a legal argument. The hearings officer's rulings on scope of review applied the code as written.

March 9, 2000

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
(503) 289-2657

Board of County Commissioners
Multnomah County

Re. **MC 13-99—Hearing 3/9/00—ERRATA and AMENDMENTS**

Alternative to a Finding in the Hearings Officer's Decision

In addition to its specific findings on the appeal issues, the Board should adopt the findings in the hearings officer's decision, the 9-page addendum on vesting, and the memorandum on scope of review. But the Board should disagree with an interpretation of a point in Union Oil Co. v. Clackamas County at page 5, last paragraph before Note 2, beginning on line 3, where the hearings officer says:

> "In Union Oil Co. the Court of Appeals also recognized that rights to complete an approved use can be abandoned even before the use is prohibited by the county."

The Board should indicate it prefers the following:

> "We are unaware of any law on the point of when a period of interruption of development is considered to have started, when a regulation making a use nonconforming is effective during the interruption. Nonconforming use law suggests the interruption should be counted from when it actually began. An analogous situation would be if an established use were interrupted before a regulation change and was not actually in affect on the date of the change. It is unnecessary to decide whether that would flatly disqualify an established use, or whether qualification would depend on the length of the interruption, since either approach would preclude vesting in this case."

The Board should also note that it does not support the reference to Union Oil Co. in "standards of the Union Oil Co. and Holmes cases", page 7, first paragraph, last line.

Typographical Error in Hearings Officer 9-Page Addendum

At page 1, paragraph 1, line 3, "if the board determines that vested rights are subject to loss" was apparently intended to say "if ... are **not** subject to loss."

Typographical Errors in my February 24th Testimony

1. Page 13, Grounds #7, 3rd line, "there is basis for reversal" should be "there is **no** basis for reversal."

2. Page 15, Note 9, 2nd line, "because if would" should be "because **it** would".