

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

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DAVID SOLBERG and KATHY)
SOLBERG, husband and wife,)
and WILLIAM GREGORY and)
MARIE GREGORY, husband and)
wife,)
Petitioners,)
v.)
CITY OF NEWBERG,)
Respondent.)

LUBA NO. 81-049

FINAL OPINION
AND ORDER

Appeal from City of Newberg.

Richard Sadler, David N. Goudler, Portland, filed the petition for review and argued the cause for Petitioners. With them on the brief were Keane, Harper, Pearlman and Copeland.

Richard D. Faus, Newberg, filed a brief and argued the cause for Respondent.

Bagg, Referee; Reynolds, Chief Referee; participated in the decision; Cox, Referee dissents.

Affirmed.

8/25/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 NATURE OF DECISION

3 This case is about the City of Newberg's decision to deny
4 an appeal from the City Planning Director's refusal to issue or
5 extend a building permit for a 10-plex multi-family project.
6 The effect of this denial is to refuse a building permit for
7 the project. Petitioners ask the Board to reverse the city.

8 FACTS

9 In the spring of 1979, petitioners purchased a lot in the
10 City of Newberg upon which they planned to develop a 10-plex
11 apartment unit. At the time of purchase, the property was
12 zoned R-2 (medium density residential), a zoning allowing such
13 a development. By June of 1979 all the excavation work had
14 been completed. At that point, it appears from the record that
15 construction ceased because the petitioners experienced
16 difficulty in obtaining financing to complete the work.
17 Petitioners, however, allege that certain construction
18 activities were undertaken in January of 1980. At that time,
19 the site was pumped by the city and paid for by the
20 petitioners. The pumping was for the purpose of removing water
21 from the construction site. We note there is comment in the
22 record as to erection of a cyclone fence, installed for safety
23 reasons, but there is no reference in the record to the pumping
24 work. Also, the record does not reveal when the fence was
25 installed.

26 On July 2, 1979, the city ordinance was amended and

1 portions of the R-2 zone were changed. The new R-2 zoning
2 regulations reduced the maximum density permissible on the site
3 to a 4-plex. At the same time, the city passed Section 572 of
4 the zoning ordinance exempting parties with existing building
5 permits from certain terms of the newly revised R-2 zone. The
6 effect of the exemption is to allow construction of what would
7 otherwise be prohibited, nonconforming uses provided valid
8 building permits existed prior to the effective date of Section
9 572. In August of 1979, petitioners learned of the change in
10 zoning provisions and asked the City of Newberg to clarify the
11 status of their project. The City Planning Director replied
12 that "construction of a 10-plex on the property may be
13 continued as a non-conforming use." The Planning Director
14 advised that construction could continue "under the time frames
15 indicated in the building permit application." Petitioners
16 continued to attempt to secure financing for the development,
17 and in the late spring of 1980, petitioners received a loan
18 commitment for the project.

19 At that point, the city advised the petitioners that
20 Ordinance Section 572 permitted continuation of non-conforming
21 projects which could be constructed within one year.
22 Petitioners had several weeks before the one year period would
23 run, but the city indicated that the project could not be
24 sufficiently constructed in the time remaining to meet Section
25 572 requirements. Petitioners formally requested an extension
26 of their building permit on June 27, 1980. The city refused to

1 extend the building permit and the petitioners appealed.

2 On October 6, the city council considered the appeal, and
3 legal counsel for the city suggested that a way to resolve the
4 matter was to amend Section 572 to allow for a two-year grace
5 period for completion of work on nonconforming uses in place of
6 the one-year grace period in the existing ordinance. The
7 proposed amendment was referred to the City Planning
8 Commission, and on November 18, 1980, the Planning Commission
9 recommended the amendment not be adopted. Similarly, the city
10 council decided not to amend the ordinance at its December 1
11 meeting, but no decision was made on petitioners' original
12 request to extend the building permit.

13 Petitioners requested the city council hold a hearing to
14 determine whether or not petitioners' original request to
15 extend their building permit should be granted, and the city
16 held such a hearing on March 2, 1981. At that meeting, the
17 city denied petitioners' appeal, and an appeal to this Board
18 followed.

19 Section 572 is as follows:

20 "572 Purpose. Within the zones established by
21 this ordinance, there exists lots, structures, and
22 uses of land and structures which were lawful before
23 this ordinance was passed or amended, but which are
24 now prohibited, regulated or restricted under the
25 terms of this ordinance and amendments.

26 "It is the intent of this ordinance to permit
these nonconformities until they are removed or
abandoned, but not to encourage their survival. Such
uses are declared by this ordinance to be incompatible
with permitted uses in the zones involved. It is
further the intent of this ordinance that

1 nonconformities shall not be enlarged upon, expanded
2 or extended, except as provided for in this ordinance.

3 "To avoid undue hardship, nothing in this
4 ordinance shall be deemed to require a change in
5 plans, construction or use of any building on which a
6 building permit in accordance with the Newberg
7 Building Code has been legally issued prior to the
8 effective date or amendment of this ordinance, except
9 that applications for extension of a building permit
10 shall not be approved to exceed a period of one year
11 from the date of adoption or amendment of this
12 ordinance. (Record page 264)." (Emphasis added).

13 The above quoted section is designed to be read in conjunction
14 with Section 303(d) of the Uniform Building Code:¹

15 "(d)- Expiration. Every permit issued by the
16 Building Official under the provisions of this code
17 shall expire by limitation or otherwise become null
18 and void, if the building or work authorized by such
19 permit is not commenced within 180 days of the date of
20 such permit, or if the building or work authorized by
21 such permit is suspended or abandoned at any time
22 after the work is commenced for a period of 180 days.
23 Before work can be recommenced a new permit shall
24 first be obtained and the fee therefore shall be
25 one-half the amount required by new permit for such
26 work provided no change has been made or will be made
27 in the original plans or specifications for such work
28 and provided further, that the suspension or
29 abandonment has not exceeded one year.

30 "Any permittee holding an unexpired permit may
31 apply for an extension wherein he may commence work
32 under the permit when he is unable to commence work
33 within the time required by this section for good and
34 satisfactory reason. The Building Official may extend
35 the time for action by permittee for a period not
36 exceeding 180 days upon written request by the
37 permittee showing that circumstances beyond the
38 control of the permittee have prevented action from
39 being taken. No permit shall be extended more than
40 once. In order to renew action on a permit after
41 expiration, the permittee shall pay a new full permit
42 fee. (Petitioner's Brief at 12, 13)"

43 ASSIGNMENT OF ERROR NO. 1

44 "A. The City of Newberg Erred When it Interpreted

1 Section 572 to Require Construction to be
2 Completed in One Year and Denied Petitioners'
3 Request to Continue Construction of Their 10-Plex
4 Project."

5 As mentioned earlier, the city views Section 572 to require
6 construction be completed within one year from the date of its
7 adoption.² Petitioners argue this interpretation is
8 unreasonable. Petitioners point out that the Uniform Building
9 Code includes no provisions on when construction must be
10 completed, only provisions regarding suspension or abandonment
11 of construction. The UBC allows extension of building permits
12 where good and sufficient reasons have been shown why work has
13 not commenced within the 180 day time of original issuance of
14 the permit. The only limitation existing is that the permit
15 holder must apply for any necessary building permit extensions
16 within a one year period from the date of the adoption of
17 Ordinance 572. As the petitioners in this case applied for an
18 extension of their building permit within a one year period
19 following adoption of 572, they argue they should be allowed to
20 continue construction.

21 Respondent argues that any ambiguities that may exist with
22 respect to Section 572 and Section 303(d) of the Uniform
23 Building Code should be resolved in favor of the city. The
24 city argues that Section 572 is not simply a remedial
25 provision, but a provision dealing with how non-conforming uses
26 are to be controlled. The policy in Section 572, according to
27 the city, "is to discourage the survival of non-conformities

1 because they are incompatible with approved property uses."
2 Respondent's Brief at 8. The city describes Ordinance 572 as
3 "restrictive."

4 We view the petitioners' interpretation of Section 572,
5 taken in conjunction with Section 303(d) of the Uniform
6 Building Code, to be the more persuasive. It would have been a
7 simple enough matter had the city intended that all
8 construction (or work on the project) be completed within one
9 year of the adoption of Section 572 to say so. Instead, the
10 city used the words "applications for extensions of a building
11 permit" and not other words indicating application for
12 extension of a limited construction time. Any "extension" of a
13 permit under this provision is an extension of the time within
14 which one may begin construction.³

15 The effect of Section 572 is to allow work to begin on a
16 project otherwise prohibited by a change in permitted uses (1)
17 where the permit was issued before the zone change; and (2)
18 where work has not begun but 180 days since issuance of the
19 permit has not passed. If these conditions are present, an
20 extension of a permit may be granted so long as permission to
21 begin work under the permit does not run past one year after
22 adoption of Section 572. Again, work must begin before one
23 year after the adoption of Section 572.

24 However, although we agree with petitioners' reading of the
25 ordinance, we do not view Section 572 to control in this case
26 for reasons which follow.

1 ASSIGNMENT OF ERROR NO. 2

2 Petitioners' second assertion is that

3 "It Would Be Error to Determine that Petitioners'
4 Buliding Permit had Lapsed in this Case."

5 Here, the petitioners recognize the city's view that the
6 building permit had expired for lack of construction for a
7 period of 180 days; and, as a result, the "saving" provision of
8 572 does not help petitioners. Petitioners argue, however, the
9 city should not be allowed to so find but should rather be
10 limited in its consideration of petitioners' application "to
11 the issues raised when the original application was rejected by
12 the Planning Director in July of 1980." At that time, the
13 Planning Director considered Section 572 to require
14 construction to have been completed within one year. The
15 petitioners asked for an extension within less than a month of
16 the one year anniversary of Section 572's adoption. Because
17 the Planning Director believed construction on this project
18 could not possibly be completed by the one year anniversary
19 date, he denied the extension of the building permit.

20 Petitioners claim the matter of whether the permit had expired
21 for lack of construction for a period of 180 days to be an
22 afterthought. Additionally, petitioners argue "that nobody has
23 ever determined that petitioners' permit did, in fact, expire
24 as a result of the UBC provision." Petitioners mention work
25 done on the property in January of 1980 when the city pumped
26 water off the construction site. Petitioners assert this work

1 is "construction" within the meaning of the UBC.

2 The city responds that the permit had clearly lapsed
3 because construction ceased for a period over 180 days. The
4 city points to Section 303(d) of the Uniform Building Code
5 which provides that if the builder fails to do "building or
6 work authorized by such permit" for a period over 180 days, the
7 permit becomes null and void. As the city found the
8 petitioners to have abandoned construction for more than 180
9 days, the only means by which petitioners could continue their
10 work would be to apply for a new permit. Under the provisions
11 of Section 572, a new permit would be impossible. See
12 assignment of error no. 1 supra. The only possible remedy for
13 the petitioners or any builder in similar circumstances who had
14 stopped construction in excess of 180 days would be to
15 establish a vested right to continue construction.⁴

16 The city made a finding in its order that construction had
17 ceased.

18 "Please be advised that on March 2, 1981 the Newberg
19 City Council met at a regular meeting and made a
20 decision relating to the above described matter.
21 After review of this matter, input from the staff,
22 yourself and Mr. Sadler, the Newberg City Council made
23 a decision to deny the appeal which would sustain the
24 decision of the Planning Director. The decision of
the City Council is based upon the fact that the
building permit for the 10-plex did expire under the
definitions found within the Oregon Uniform Building
Code as site construction of the 10-plex had ceased
for a period in excess of 180 days."

25 The order goes on to mention Section 572 of the Ordinance and
26 states that Sections 572 through 586 of the ordinance would not

1 allow the issuance of a new permit because the 10-plex would be
2 a non-conforming use.

3 We view the city's position to be supported by the record.
4 A portion of the transcript of the appeal hearing before the
5 city council of March 2, 1981 was included in the record. In
6 the course of that hearing, as revealed by the transcript, the
7 matter of whether construction had ceased was mentioned several
8 times. Our reading of the transcript reveals that the parties
9 understood that physical work on the project had ceased, but
10 there was a question raised by petitioners' attorney as to what
11 constituted "construction" in a legal sense. Petitioners'
12 attorney was unwilling, as were petitioners, to admit that the
13 permit expired, but there was no evidence offered before the
14 city council as to any construction beyond that of the
15 excavation for the foundation and placement of a cyclone fence
16 installed for safety reasons. There is no comment in the
17 record as to when the cyclone fence was installed, and there is
18 no comment in the record which supports petitioners' statement
19 as to any work done in January to pump water out of the site.
20 A fair reading of the transcript illustrates only that
21 construction work occurred through the spring of 1979 and not
22 thereafter.⁵

23 In summary, then, the order to includes a finding that the
24 petitioners' building permit had expired for want of
25 construction activity for a period in excess of 180 days. We
26 view the record to support that finding. We must therefore

1 find in favor of the city with respect to the issue of whether
2 petitioners' building permit had in fact expired. Petitioners
3 did have a hearing before the city council at which time the
4 matter of whether construction had ceased was discussed. Had
5 petitioners been able to present evidence showing that
6 construction had not ceased, petitioners could have and should
7 have done so, or at least requested the opportunity to do so,
8 at that time. Dobaj v. Beaverton, 1 Or LUBA 237 (1980).

9 ASSIGNMENT OF ERROR NO. 3

10 The third error alleged by petitioners is as follows:

11 "The City of Newberg Erred When it Failed to Determine
12 that Petitioners had a Vested Right to Continue
Construction of Their 10-Plex Project."

13 Here, petitioners ask the Board to determine that a vested
14 right exists in favor of petitioners. The respondent quickly
15 notes that under the provisions of Oregon Laws 1979, ch 772,
16 sec 3(1) the Board has no power to review a land use decision
17 to determine whether a vested right exists. The Board may
18 review land use decisions, and land use decisions are decisions
19 that concern the adoption, amendment or application of:

20 "(A) The state-wide planning goals;

21 "(B) A comprehensive plan provision; or

22 "(C) A zoning, subdivision or other ordinance that
23 implements a comprehensive plan;"

24 Respondent advises "this definition does not contemplate the
25 resolution of questions of fact as to whether or not a property
26 owner has a 'vested right to a non-conforming use.'"

1 We agree with the respondent. The question of whether or
2 not the petitioners have alleged sufficient facts to establish
3 a vested right exists is a matter of fact that must be
4 determined in a trial proceeding and not a review proceeding.
5 The Board does not have the authority to conduct evidentiary
6 hearings for determining whether or not sufficient facts exist
7 to give rise to a vested right. Indeed, the Board's power to
8 hold evidentiary hearings is limited to cases of

9 "disputed allegations of unconstitutionality of the
10 decision, standing, ex parte contacts or other
11 producedural irregularities not shown in the record
12 which, if proved, would warrant reversal or remand,
the board may take evidence and make findings of fact
on those allegations." Oregon Laws 1979, ch 772, sec
4(7).

13 We do not believe a matter of vested rights falls within this
14 exception. See Metropolitan Service District v. Clackamas
15 County, 2 Or LUBA 139, 143; Clackamas County v. Holmes, 265 Or
16 193, 508 P2d 190 (1973); Jackson v. Clackamas County Comm., 26
17 Or App 265, 552 P2d 559 rev den (1976).

18 CONCLUSION

19 The matter of the City of Newberg's refusal to amend
20 Ordinance 572 as alleged in the notice of intent to appeal in
21 LUBA No. 80-175 having been dropped by the parties is
22 dismissed. The decision of the City of Newberg to deny the
23 appeal of petitioner as alleged in the notice of intent to
24 appeal in LUBA No. 81-049 is affirmed.

1 COX, Dissenting.

2 The outcome of this case depends on whether "construction"
3 as that term is used by respondent had ceased. "Construction
4 is not defined by the city. Black's Law Dictionary defines
5 construction in the context it is used in this case as:

6 "The process of bringing together and correlating a
7 number of independent entities, so as to form a
definite entity."

8 The record is clear that petitioners were attempting to
9 obtain financing when erection activity was ceased. Financing
10 is an integral, necessary part in the "construction" of any
11 building. Without financing in some form, not one building
12 would be erected.

13 The majority in footnote 2 seems to be equating the word
14 "construction" with the UBC words "building" or "work." They
15 cite no authority for doing so and the record does not reveal
16 the city's intention to make such an equation. Even if such
17 interchangeability of words is allowed, to say that obtaining
18 financing is not work is equivalent to not recognizing the
19 worth of the entire financial community which makes up a major
20 portion of the service element of the U. S. economy.

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FOOTNOTES

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1 The Uniform Building Code (UBC) has been adopted as an ordinance by the city.

2 The city consistently uses the word "construction" when referring to Section 572 and the UBC. We note the word "construction" does not appear in the relevant portions of the UBC, only the words "building" or "work."

3 Without Section 572, a zone change might preclude starting construction under a building permit issued before the zone change. The UBC has no provision that protects a building permit from changes in zone. Building permits do not give rise to a vested right to construct a nonconforming use. See Anderson, American Law of Zoning, sec 6.23-6.24 (2d ed, 1976). A permitted use one day may be prohibited the next.

4 See Assignment of Error #3, infra.

5 Our review is limited to the facts appearing in the record. We are not at liberty to supplement the record of the governing body with facts brought to our attention in the briefs of the parties.