

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR THE COUNTY OF KLAMATH

In the matter of the application  
of Anadromous, Inc. for site review  
for a salmon hatchery at Fort Creek

FINDINGS, CONCLUSIONS,  
AND ORDER # 90-195

THIS MATTER came before the Board on an appeal by Anadromous, Inc. from a February 6, 1990 Site Plan Review conducted by the Planning Director who concluded that Site Plan approval could not be granted without Anadromous, Inc. obtaining a Conditional Use Permit and meet the standards and criteria of Article 44, Article 83 and any other relevant provision of the Klamath County Land Development Code and Comprehensive Plan.

The Board properly advertised the hearing on this appeal for March 8, 1990, and at that time a quorum of the Board convened and continued the hearing to March 15, 1990. No objections to the public notice for the original decision or for the Board's hearing were made.

The appeal hearing was conducted de novo pursuant to ORS 215.416 (11). Anadromous, Inc. appeared and presented its testimony through its attorney. Randy and Cynthia Sparacino appeared and presented their testimony through their attorney. Additional testimony was presented by other neighbors. Staff provided its report and offered a number of exhibits, all of which were made part of the record.

Following the hearing, the Board allowed the record to remain open for further evidentiary submittals and for written arguments. Both Anadromous, Inc. and the Sparacino's submitted written evidence and argument through their attorneys. In its brief, Anadromous, Inc. raised, for the first time, the issue of a "vested right" and Sparacinos' requested an opportunity to reply to that issue. On May 9, 1990, the Board of County Commissioners met and continued the matter to May 30, 1990, for decision only and requested additional

1 evidence and briefing on the issue of "vested rights." Both parties submitted additional  
2 evidence and briefs.

3 The Board of County Commissioners, after carefully reviewing all of the evidence and  
4 arguments of the parties, met on May 30, 1990, and made their decision.

5 **I. Scope of Review and Issues Before the Board.**

6 The Board conducts this review and makes this determination based upon all of the  
7 evidence in the record prepared by the Planning Director and all evidence submitted to the  
8 Board. The Board's review is de novo.

9 The issues raised are:

- 10 1. Does Anadromous, Inc. already have site plan approval?
- 11 2. Is Klamath County estopped from requiring compliance with the site plan  
12 provisions?
- 13 3. What substantive provisions apply to a site plan review conducted after  
14 construction?
- 15 4. Were the improvements that were made in 1984 an expansion or just a  
16 continuation of an existing non-conforming use?
- 17 5. Did Anadromous, Inc. have a vested right to site plan approval in April, 1984,  
18 based on substantive standards in existence prior to the February 29, 1984, adoption of the  
19 new land development code?
- 20 6. Is Anadromous, Inc. entitled to ministerial approval of its site plan application?
- 21 7. Was the Planning Director correct regarding the lack of a required water  
22 appropriation permit for the Dixon Ditch?
- 23
- 24

25 The standards and criteria relevant to review of this matter are found in the  
26 Statewide Planning Goals and Guidelines; the Klamath County Comprehensive Plan and the

Anadromous, Inc. Site Review

1 Klamath County Land Development Code. These are specifically set out in the decision of  
2 the Planning Director and are incorporated herein by reference thereto.

3 **II. Factual Findings.**

4 The Board of County Commissioners, after careful consideration of the testimony and  
5 evidence in the record, issues the following findings of fact:

- 6 1. Anadromous, Inc. operates a salmon hatchery and rearing facility on  
7 approximately 80 acres of property near Fort Klamath in Klamath County  
8 (Klamath County tax lot R3307-v2300-00100). The facility is a hatchery and  
9 rearing facility for atlantic, Chinook and Coho salmon which are trucked to  
10 ranch facilities on the Pacific Ocean.
- 11 2. The facility is located on property designated as "Agricultural" in the  
12 Klamath County Comprehensive Plan and zone "Exclusive Farm Use-Grazing  
13 (EFU-G)".
- 14 3. Fort Creek is identified as a significant ("1-c") Goal 5 resource in the  
15 Klamath County Comprehensive Plan, with a designation to limit conflicting  
16 uses ("3-c") to the fish and surface water resources. Land uses affecting the  
17 resources are subject to provisions of Article 83 of the Land Development  
18 Code.
- 19 4. On October 10, 1982, Anadromous, Inc. was issued a building permit based  
20 on plans submitted. The plans were reviewed and approved by the Planning  
21 Department.
- 22 5. On November 23, 1982, Anadromous, Inc. was issued National Pollutant  
23 Discharge Elimination System (NPDES) waste discharge permit number  
24 3593-J by the Oregon Department of Environmental Quality (DEQ). That  
25  
26

1 permit authorized the discharge of fish rearing wastes to a single outfall in  
2 Fort Creek at approximately river mile two.

- 3 6. On January 3, 1983, Anadromous, Inc. was issued a permit by the Oregon  
4 Water Resources Department to appropriate public waters of Fort Creek for  
5 the purpose of fish culture limited to the amount of water applied to the  
6 beneficial use, and not to exceed 44.7 cubic feet per second.
- 7 7. Anadromous, Inc. has operated with a fish propagation license issued by the  
8 Oregon Department of Fish and Wildlife (ODFW). The most recent license,  
9 number 1958, was issued January 20, 1989.
- 10 8. Anadromous, Inc. began plans for the expansion of its facility in May of 1983,  
11 and obtained a Resolution from the Board of County Commissioners on  
12 December 6, 1983, approving an Industrial Development Revenue Bond  
13 application. Anadromous, Inc. expended the sum of \$74,626.07 prior to  
14 December 6, 1983 and an additional \$127,108.80 prior to the adoption of the  
15 new Land Development Code and Comprehensive Plan on February 29, 1984  
16 on all of the aspects of its project, for a total expenditure of \$201,734.87 prior  
17 to the adoption of the new code.
- 18 9. The total expenditure from the combined projects was \$1,500,000 and the  
19 amount of expenditure specifically on the Fort Creek project for the 1984  
20 improvements was \$1,192,000.
- 21 10. The expenditures by Anadromous, Inc. for the Fort Creek project were  
22 directly related to its expenditures for the Coos Bay and Linn County  
23 projects, all of which relied upon the other.
- 24 11. Notice of hearings on the adoption of the revised code were published in  
25  
26

1 accordance with law beginning November 10, 1983.

2 12. The Klamath County Comprehensive Plan was adopted on November 25,  
3 1981 and revised on February 29, 1984 to include Goal 5, Policy 22.

4 13. The Klamath County Land Development Code was adopted on November  
5 25, 1981, and revised on February 29, 1984 to include Article 83.

6 14. During the period since initial construction, the facility has been operated on  
7 a virtually continuous basis from approximately March of 1983 to the present,  
8 with the exception of approximately six (6) months from the Spring of 1984  
9 to the Fall of 1984. The facility has been modified and expanded from time  
10 to time. The facility was essentially reconstructed in 1984 with only the  
11 concrete diversion structure on Fort Creek remaining. A number of minor  
12 additions or alterations have occurred since 1984 but these did not  
13 substantially or materially alter or increase the use.  
14

15 15. The facility approved in 1982 and constructed in 1982 and 1983 allowed for  
16 the raising of approximately one million (1,000,000) fish. The facility as  
17 modified in 1984 allowed for the raising of approximately fourteen million  
18 (14,000,000) fish.

19 16. On April 25, 1984, Anadromous, Inc. was issued building permit number 84-  
20 694 for construction of a fish hatchery. That building permit does not bear  
21 a signature from the Planning Department showing that a site plan was  
22 reviewed for compliance with the Comprehensive Plan and Land  
23 Development Code.

24 17. On July 25, 1989, Anadromous, Inc. requested that the Planning Department  
25 complete a land use compatibility statement for its renewal application of  
26

1 NPDES permit 3593-J. On August 14, 1989, the Planning Director issued a  
2 tentative decision that the hatchery facility was not compatible with the  
3 Klamath County Comprehensive Plan due to the company's failure to secure  
4 a series of planning permits and approvals related to construction and  
5 operation of the facility.

- 6 18. The Planning Director's tentative decision was appealed by Anadromous, Inc.  
7 and by an adjacent property owner. On September 14, 1989 an appeal  
8 hearing was conducted before the Board of County Commissioners. On  
9 November 2, 1989 the Board issued Order number 90-054, finding that the  
10 facility is allowed by the Comprehensive Plan but subject to standards in  
11 sitting, design, construction and/or operation. The Board further concluded  
12 that the facility was not in compliance with site plan review requirements of  
13 the Land Development Code.
- 14 19. Randy and Cynthia Sparacino filed a Notice of Intent to Appeal the decision  
15 of the Board to LUBA, case no. 89-135. Anadromous, Inc. intervened in that  
16 proceeding. Subsequently, Anadromous, Inc. filed a Notice of Intent to  
17 Appeal the decision of the Board to LUBA, case no. 89-142. The Sparacino's  
18 intervened in that proceeding. Both appeals were consolidated by LUBA.
- 19 20. On December 21, 1989, Anadromous, Inc. submitted an application for Site  
20 Plan Review under Article 41 of the Land Development Code.
- 21 21. On February 6, 1990, the Planning Director issued his Findings, Conclusions  
22 and Decision deciding that Anadromous, Inc. had not complied with the site  
23 plan review requirements.
- 24 22. On February 13, 1990, LUBA issued its Final Opinion and Order affirming  
25  
26



1 the decision of the Board of County Commissioners.

2 23. On March 5, 1990, Anadromous, Inc. filed a Petition for Judicial Review in  
3 the Court of Appeals and on March 16, 1990, moved for a dismissal of that  
4 Petition. The motion was granted on March 21, 1990.

5 **III. Conclusions of Law.**

6 Based upon the above listed findings of fact, and after a careful review of this matter,  
7 the Board concludes:

8 1. Both Anadromous, Inc. and the Sparacino's spent a great deal of time in their  
9 presentations and arguments attempting to establish whether Anadromous, Inc. indeed  
10 needed this site plan review at all. While the Board appreciates the efforts of these parties,  
11 they miss the primary issues. For the following reasons, the Board concludes that this site  
12 plan review is required:

13 a. This is an application by Anadromous, Inc. for site plan review. It is not  
14 logical for them to argue that such a review is not required when they applied for it.  
15 The County is obligated to conduct a site plan review upon application and cannot  
16 determine that such a review is not necessary. The only reasonable inference that  
17 may be drawn from the fact of the application is that a site plan review is required.

18 b. LUBA, in its earlier decision in Sparacino v. Klamath County, et al, LUBA  
19 No. 89-135 and 89-142 (February 13, 1990) affirmed the determination of the County  
20 that Anadromous, Inc. had not obtained the required site plan reviews. That issue  
21 was specifically raised by Anadromous, Inc. as one of its assignments of error and was  
22 a critical element in the decision. Anadromous, Inc. abandoned its judicial review of  
23 that decision and it became a final decision.

24 A determination such as was made by the County, and affirmed by LUBA, is subject  
25

1 to the doctrine of res judicata if the following apply:

- 2 a. Identity of parties;
- 3 b. Opportunity for all parties to participate during the first proceeding;
- 4 c. Substantially identical issues of law and fact in both proceedings;
- 5 d. Failure to obtain judicial review.

6 In the present case, all of these conditions are met. As a result, that decision is res  
7 judicata as far as the issue of whether site plan reviews were obtained. Chavez v.  
8 Boise Cascade Corporation, 307 Or 632 (1989); Stuckey v. Weinberger, 488 F2d 904  
9 (1973). Accordingly, the issue is resolved and cannot be relitigated in this  
10 proceeding.

11 If the issues of "vested rights" or estoppel raised by Anadromous, Inc. are intended  
12 to deal with the issue of whether a site plan review occurred or can be required at this time,  
13 the Board concludes that Anadromous, Inc. waived that issue by not raising it in the earlier  
14 land use compatibility matter.

15  
16 2. There is no basis to estop Klamath County from enforcing its site plan review  
17 requirements. At best, the evidence of Anadromous, Inc. shows that it obtained site plan  
18 approval in 1983. No evidence was submitted showing that any such review was obtained in  
19 1984 or later. In addition, there is no evidence to support the elements of estoppel,  
20 particularly in regards to the requirement for a false representation or reliance upon such  
21 a representation. However, such a theory cannot be used against the County in a land use  
22 enforcement proceeding. Sellwood Harbor Condominium Assn. v. City of Portland, \_\_\_\_ Or  
23 LUBA \_\_\_\_ (LUBA Nos. 87-079, 87-080, April 1, 1988).

24  
25 3. A review of the law of the matter fails to reveal any precedent as to what  
26 substantive law to apply in conducting a site plan review at a date later than the date of



1 construction. However, in considering the equities of the matter, the Board of County  
2 Commissioners concludes that it is appropriate to conduct the site plan review based upon  
3 the substantive standards in effect at the time the construction was accomplished.

4 4. The next issue to be decided is whether the Planning Director was correct in his  
5 determination that Anadromous, Inc. must apply for a Conditional Use Permit pursuant to  
6 the Klamath County Plan, Goal 5, Policy 22 and comply with the requirements of Article 83.

7 The Board of County Commissioners concludes that the use as established in 1982  
8 and 1983 was a lawful use at that time and conformed to the Land Development Code in  
9 existence at that time. Had the use been proposed after the adoption of the current code,  
10 it clearly would require a conditional use permit pursuant to Goal 5, Policy 22 and  
11 compliance with Article 83. As such, the use, as it existed on the date of adoption of the  
12 current Land Development Code, would not be in conformance with the current code. It  
13 would therefore be considered a nonconforming use:  
14

15 Nonconforming use includes any of the following which were lawfully  
16 established before the effective date of this Code:

- 17 A. A building, structure (including signs), land use, or activity  
18 which was established or is conducted in a manner which does  
19 not conform with one or more standards or permit  
20 requirements of this code.

21 KCLDC 97.002 A. (emphasis added).

22 As a nonconforming use, Anadromous, Inc. was entitled to continue and maintain that  
23 use regardless of any changes in the Land Development Code. KCLDC 97.003. However,  
24 the expansion of the use in 1984 would bring the matter within the control of the current  
25 code:

26 Expansion - The use may not be enlarged, increased, or  
extended to occupy a greater area of land than [sic] that  
occupied by such use on the effective date of this Code.

1 KCLDC 97.006. Therefore, the expansion which occurred after the issuance of the building  
2 permit on April 25, 1984, enlarged or extended the use to occupy a greater area of land and  
3 would not be eligible for any rights under Article 97. That expansion would be required to  
4 conform with the Comprehensive Plan and Land Development Code in existence at that  
5 time.

6 This conclusion is further supported by the provisions of KCLDC 12.001 B which  
7 states:

8 Existing Uses. The provisions of this Code are not retroactive in their effect  
9 on a use of land lawfully established on the date of adoption of this Code,  
10 unless an alteration, expansion or modification to an existing use is proposed  
11 which requires a land use decision pursuant to this Code.

12 In addition, KCLDC 12.002 A. provides:

13 Actions initiated under this Code shall be consistent with the adopted  
14 Klamath County Comprehensive Plan and with applicable county, state, and  
15 federal laws and regulations as these plans, laws, and regulations may now or  
16 hereafter provide.

17 Based upon the foregoing, the Board of County Commissioners concludes that the  
18 improvements of 1984 would require compliance with the standards in effect in 1984, rather  
19 than the standards in effect in 1982 or 1983, unless Anadromous, Inc. had a "vested right"  
20 to the earlier standards.

21 5. Anadromous, Inc. has raised the issue that it had obtained a "vested right" to  
22 complete the expansion of the facility. Oregon law recognizes the concept of "vested rights"  
23 which allow a landowner to continue development of property notwithstanding the fact that  
24 subsequent changes in the law would prohibit or limit that development:

25 The test of whether a landowner has developed his land to  
26 the extent that he has acquired a vested right to continue the  
development should not be based solely on the ratio of  
expenditures incurred to the total cost of the project. We  
believe the ration test should be only one of the factors to be

1 considered. Other factors which should be taken into  
 2 consideration are the good faith of the landowner, whether or  
 3 not he had notice of any proposed zoning or amendatory  
 4 zoning before starting his improvements, the type of  
 5 expenditures, *i.e.*, whether the expenditures have any relation  
 6 to the completed project or could apply to various other uses  
 7 of the land, the kind of project, the location, and ultimate  
 8 cost. Also, the acts of the landowner should rise beyond mere  
 9 contemplated use or preparation, such as leveling of land,  
 10 boring test holes, or preliminary negotiations with contractors  
 11 or architects.

12 Clackamas County v. Holmes, 265 Or 193, 198, 508 P2d 190 (1973); Hanley v. City of Salem,

13 14 Or LUBA 204 (1986).

14 First of all, it must be noted that the use, namely aquaculture, was in existence prior  
 15 to even the consideration of the new plan and code and was a permitted use at that time.  
 16 That use, continued with the 1984 improvements but was intensified. Thus, the existing use  
 17 was aquaculture. Pohrman v. Klamath County Commissioners, 25 Or App 613, 550 P2d 1236  
 18 (1976).

19 Key in the position of Anadromous, Inc. is the Industrial Development Revenue Bond  
 20 (IDRB) hearing of December 6, 1983. That matter dealt with the approval of the Board of  
 21 County Commissioners of a Resolution which, among other things, set out the following  
 22 finding:

23 WHEREAS, the Board finds that the project is in compliance with the state-wide  
 24 planning goals adopted by the Land Conservation and Development Commission  
 25 pursuant to ORS chapter 197. . .

26 Anadromous, Inc. has argued that the IDRB hearing was a "land use hearing" at  
 which time the Board made a "land use compatibility" decision. While that may be correct,  
 it is not relevant to the issue at hand. At best, the December 6, 1983, decision can be  
 classified as a determination by the Board of County Commissioners that, at that time, the

1 proposal was compatible. There was no determination that the proposed use would be  
2 compatible in the future. In addition, that hearing was not a site plan approval process.

3 The total amount of the IDRb was \$1,500,000, of which it appears that \$1,192,000  
4 was to be spent in the Fort Creek project. The ratio of expenditures prior to the adoption  
5 of the revised code to the project cost is 13.45% for the entire project and 16.92% for the  
6 Fort Creek portion. Thus, by processing the IDRb application to the extent that it was done,  
7 Anadromous, Inc. had taken substantial steps toward to expansion of the use and would rise  
8 beyond "mere contemplated use or preparation." The fact that the expenditures also were  
9 to be applied to projects in Coos and Linn Counties does not minimize this conclusion since  
10 the three projects were tied together in such a manner that the failure of one project would  
11 likely cause the failure of the others.

12 The other factors to be considered in regards to the "vested rights" issue include the  
13 good faith of the landowner and whether or not he had notice of the proposed zoning  
14 changes. There certainly is no evidence of actual notice and any constructive notice occurred  
15 at such a time as the project was well underway. In fact, considering the rather convoluted  
16 manner in which the Code conflicts with the Plan, with the Code listing the use as permitted  
17 outright in the zone but the Plan requiring a conditional use permit where uses conflict with  
18 resource areas, it would be reasonable for Anadromous, Inc. to **not** be aware of the Goal 5,  
19 Policy 22 contradiction. Based upon a review of the record as a whole, the Board of County  
20 Commissioners concludes that Anadromous, Inc. was proceeding in good faith.

21 An additional test looks to the type of expenditures made. All of the expenditures  
22 related to work done by bond counsel in obtaining the IDRb and by consultants in drawing  
23 the plans for the facility, as well as the Coos Bay facility. Some equipment was purchased  
24 although it cannot be determined if the equipment would be for the Fort Creek site or for  
25  
26

1 the Coos Bay site. All of the expenditures, however, were directly related to the completed  
2 project which could not have been accomplished without them, taking into consideration the  
3 kind of project, its locations and the ultimate cost. The expenditures made were of the type  
4 that could only be applied to the specific sites involved and to the specific use of aquaculture.  
5 Taking into account the difficulties of processing an IDRB application, the Board of County  
6 Commissioners concludes that the expenditures were more extensive than mere contemplated  
7 use or preparation.

8 The Board of County Commissioners therefore concludes that Anadromous, Inc. had  
9 a "vested right" to complete the planned development in 1984 based upon the standards  
10 existing prior to February 29, 1984.

11 There still remains, however, an issue regarding additions or alterations after the 1984  
12 remodeling. For those additions or alterations, there could be no "vested right" to the earlier  
13 standards. Therefore, the Board of County Commissioners concludes that additions or  
14 alterations which occurred after the completion of the work shown on the April 25, 1984,  
15 building permit would require site plan approval based on the Code in effect at the time of  
16 the addition or alteration.

17  
18 6. Since Anadromous, Inc. had a "vested right" to the earlier standards for its 1984  
19 improvements, the review to be done would be the ministerial review by the Planning  
20 Director without the need for a Conditional Use Permit. The Board of County  
21 Commissioners concludes that the additions or alterations after 1984 did not substantially or  
22 materially change the nature or extent of the use and therefore there would be no  
23 requirement of issuance of a Conditional Use Permit since Goal 5, Policy 22 deals with the  
24 "establishment" of a conflicting use. Likewise, compliance with the provisions of Article 83  
25 are not required.  
26

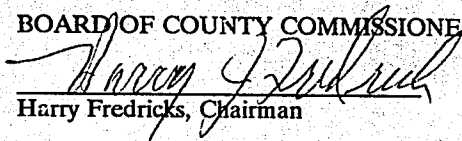
7. The Planning Director further determined that Anadromous, Inc. had not provided evidence of a water appropriation permit issued by the Water Resources Department for the "Dixon Ditch." While Anadromous, Inc. presented evidence as to its potential water rights, that evidence does not show that a water appropriation permit is not necessary. The Board of County Commissioners therefore concludes that Anadromous, Inc. has failed in its burden of proof as to this issue and is required to provide either the appropriate permit or evidence from the Water Resources Department showing that a permit is not needed.

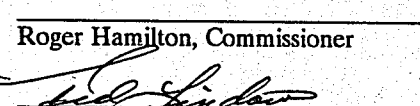
### ORDER

Based upon the forgoing discussion, the Board of County Commissioners orders that the decision of the Planning Director is reversed and the matter is remanded to the Planning Director for compliance with this decision.

Dated this 30th day of May, 1990.

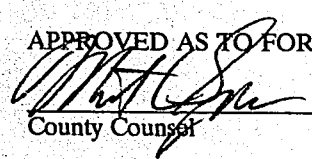
BOARD OF COUNTY COMMISSIONERS

  
Harry Fredricks, Chairman

  
Roger Hamilton, Commissioner

  
Ted Lindow, Commissioner

APPROVED AS TO FORM:

  
County Counsel

STATE OF OREGON,  
County of Klamath ss.

Filed for record at request of:

Klamath County  
on this 30th day of May A.D., 19 90  
at 4:25 o'clock P.M. and duly recorded  
in Vol. M90 of Deeds Page 10319

Evelyn Biehn County Clerk

By  Deputy.

Fee, none

Anadromous, Inc. Site Review  
Page 14