IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLATSOP

OREGON SHORES CONSERVATION COALITION, an Oregon non-profit corporation,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONS OF CLATSOP COUNTY, an Oregon municipal corporation.

Respondent,

AND

STATE OF OREGON by and through the Department of Land Conservation and Development,

Petitioner-Plaintiff,

v.

CLATSOP COUNTY,

Respondent-Defendant,

GARY S. ASPMO and BEVERLY J. ASPMO, Individually,

Defendants.

Case No. 16CV09677
(Consolidated)

**PETITIONER OREGON SHORES CONSERVATION COALITION'S OPENING BRIEF/ HEARING MEMORANDUM**

Case No 16CV09739
(Consolidated)



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# I. INTRODUCTION

Petitioner Oregon Shores Conservation Coalition seeks review of Respondent Clatsop County's decision approving a 15-lot subdivision as a vested right under Ballot Measure 49. The applicants, Gary and Beverly Aspmo, held "waivers" issued pursuant to former Measure 37 to allow development of their property that would be prohibited under current zoning laws. Measure 49 allows certain Measure 37 developments to proceed if the proposed use complies with the waiver and the landowner demonstrates that the right to develop was vested under Measure 49 and the common law on December 6, 2007.

In approving a 15-lot subdivision, Respondent misconstrued the law and adopted a decision not supported by substantial evidence in the record. First, Respondent misconstrued the law of vested rights under Measure 49. In reversing and remanding Respondent's 2008 approval of the Aspmos' vested right, the Court of Appeals held that the county and the reviewing court erred in failing to "assess the total cost of the development, which necessarily includes building costs, that the Aspmos sought to vest as of December 6, 2007—the effective date of Ballot Measure 49 (2007)." *Oregon Shores Conservation Coalition v. Bd. of County Comm'rs*, 249 Or App 531, 535-36, 277 P3d 639 (2012). The development that the Aspmos sought to vest as of December 6, 2007 was a 30-lot subdivision. In the course of this remand proceeding, county planning staff and the Board of Commissioners correctly determined that the applicants had not proceeded far enough in their actions to vest the 30-lot subdivision. Respondent misconstrued the applicable law in concluding



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that it could verify a vested right in a different project (a 15-lot subdivision) than the one the applicants sought to vest as of the effective date of Measure 49.

Second, Respondent's decision is not supported by substantial evidence. In order to conclude the applicants have a vested right to continue and complete their project, the county was required to find, as a historical fact, the total cost to develop the project proposed on December 6, 2007. Nothing in the record demonstrates that the Aspmos sought to develop a 15-lot subdivision as of December 6, 2007. The preliminary plat approval obtained prior to the effective date of Measure 49 shows the arrangement of 30 residential lots. No evidence supports a finding as to what the approved 15-lot subdivision would look like, let alone what its likely cost to build would be—a fact required to support a vested right.

Third, Respondent misconstrued the law in considering whether the applicants' expenditures were related to the proposed development or could be adapted to other lawful uses of the property. Respondent incorrectly construed *Friends of Yamhill County v. Bd. of Comm'rs*, 351 Or 219, 264 P3d 1265 (2011) ("*Friends*") as holding that adaptable expenses are not to be deducted from the numerator. Respondent considered only whether expenditures are "more consistent with" the proposed use than with other allowed uses in the zone. Under *Friends*, adaptable expenditures are either not counted or discounted from the expenditure ratio. In addition, Respondent erred in placing the burden of proof on Oregon Shores to demonstrate that costs are adaptable to other uses. In demonstrating a vested right, the applicants bear the burden of proof, not the challenger.



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Fourth, Respondent misconstrued the law regarding discontinuation of nonconforming uses. A vested right is an inchoate nonconforming use, and is subject to the same limits on discontinuance. Here, by failing to take steps for almost two years following the remand of their application to the county, the applicants discontinued any vested right in their development they may have had.

Fifth, Respondent misconstrued the law in deciding that the applicants' use complies with the terms of their Measure 37 waivers. The State Waiver explicitly waived only Goal 4. Other goals, including Goals 10, 11, and 14, were not waived and would prohibit the proposed development. Respondent should have concluded that the proposed use does not comply with the terms of the waiver as required by Measure 49.

Finally, Respondent erred in concluding that the proposed use is consistent with the location. The property is surrounded by forestry and agricultural uses. The Planning Director correctly determined that the applicants failed to meet the sixth common law vested rights factor regarding the type of use and location.

The applicants failed to meet their burden under Measure 49 to demonstrate a right to a nonconforming use consistent with their waivers. Petitioner Oregon Shores respectfully requests that this court reverse Respondent's decision, or in the alternative, remand with instructions to Respondent on how it may properly reach a valid decision.

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## II. FACTS

### A. Incorporated Facts.

This brief hereby incorporates facts set forth in Petitioner's Petition for Writ of Review.

### B. The Challenged Decision.

The challenged decision is the Final Clatsop County Measure 49 Vesting Determination in Decision Document # 201601024 ("the Decision") in county File Number M49-04-01, issued on or about January 27, 2016. The Decision determined that Gary & Beverly Aspmo ("the applicants") have a vested right to complete and continue a 15-lot subdivision. Record at 2092.

### C. The Parties.

Respondent Board of Commissioners of Clatsop County issued the quasi-judicial Decision. Gary and Beverley Aspmo were the applicants for vesting in the Decision and own the subject property. Record at 2064. Petitioner, Oregon Shores Conservation Coalition ("Oregon Shores") participated in the proceedings leading to the decision and raised its concerns about the adverse effects of the applicants' proposed development on forest lands, groundwater, and livability on the record by participating in the proceedings below. *See* Record at 488, 2363, 2502, 2556. Measure 49 provides that a person that is adversely affected by a final vested rights determination may obtain judicial review of that determination under ORS 34.010 to 34.100 (writ of review). Measure 49 Section 16, *codified at* ORS 195.318(1). A person is adversely affected if the person "timely submitted written evidence,



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arguments or comments to a public entity concerning the determination." ORS 195.318(2). Oregon Shores therefore has standing to bring this writ of review action.

## D. The Subject Property.

The property subject to the applicants' claim is approximately 85 acres in size and zoned Agriculture-Forestry (AF), in rural Clatsop County and situated at T8N, R9w, Section 31, Tax Lot 2900 ("the Property"). Record at 2064-65. Clatsop County found that the owner, Beverly Aspmo, acquired interest in Tax Lot 2900 January 2, 1953 and April 8, 1963. Gary Aspmo acquired an interest in the property on February 27, 1992. Record at 249, 1823.

## E. The Applicants' Measure 37 Waivers.

The applicants sought compensation under former Measure 37 to subdivide and develop their property for residential use. The applicants received separate "waiver" orders under former Measure 37 from the county on July 13, 2005 (Clatsop County Board Resolution and Order on Claim #05-06; Doc# 2005070095) ("County Waiver") and the State of Oregon on August 7, 2005 (Final Order, Claim No. M119786). Record at 335, 1683 ("State Waiver"). The County Waiver provided that the county would "waive the application of those zone and lot size regulations, causing devaluation of the property, imposed on the Property by the County after the date of acquisition of each claimant." Record at 250, 1824. The State Waiver provided that the State would "not apply the following laws to Beverly Aspmo's and Gary S. Aspmo's division of the subject property into lots or parcels or the approval of dwellings on each lot or parcel created: applicable provisions of ORS 215.705 to



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215.755 and 215.780, Statewide Goal 4 and OAR 660-06-0026 to 0055." Record at 335, 1683. The County Waiver did not affect the State Waiver. Record at 250, 1824. The State Waiver expressly states that it waives laws with regard to the Property only to the extent necessary to allow uses "permitted at the time [Beverly Aspmo] acquired it on January 2, 1953 and March 6, 1963" [1] and does not authorize use without obtaining other licenses or permits. Record at 335-36; 1683-84.

**F. Preliminary Plat Approval and Site Preparation.**

Subsequent to receiving the waiver orders, the applicants applied for a 30-lot subdivision on February 16, 2007. Record at 79; 537. On June 12, 2007 the County Planning Commission held a public hearing to consider the application and conditionally approved the subdivision application. Record at 79, 479, 701-08. The Oregon Department of Land Conservation and Development (DLCD) appealed the Planning Commission's approval of the preliminary plat on July 2, 2007, and the parties to that appeal subsequently settled. Record at 447, 458. On August 23, 2007 the Clatsop County Board of Commissioners adopted a Resolution and Order modifying the Planning Commission's approval of the preliminary plat, incorporating Goal 14 requirements, fire, life and safety standards, and Goal 4 implementing rules. Record at 455. The approved preliminary plat shows the arrangement of 30 lots in three phases (Record at 347, 540), and "is personal to Beverly Aspmo pursuant to the County and State-approved Measure 37 claims." Record at 531.

[1] The State Waiver order further provided, "[f]or Gary S. Aspmo, only those laws that became effective after February 24, 1992 will not apply to his use of the property." Record at 335-65, 1684.



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Subsequent to obtaining the waiver orders, and prior to the effective date of Measure 49, the applicants drilled three wells, obtained septic evaluations and approvals for 5 lots, and graded and rocked roads. Record at 78-79, 381-83, 349-51. The applicants pursued several permits and approvals applicable to the subdivision including a construction NPDES permit for stormwater control from the Department of Environmental Quality (Oct. 17, 2007) (Record at 236); septic site evaluations (Feb. 12, 2007) (Record at 371-80); Department of Forestry Logging and Clearing permit (June 14, 2007) (Record at 387); and county permits to construct an approach road (Permit Nos. 06-82, 06-77). Record at 384, 385. The septic evaluations were completed prior to preliminary subdivision plat approval and were for lots 1-4 and lot 6. Record at 349-351; 379-80. According to the applicants, final grading of the road was completed on November 7, 2007. Record at 351. However, the road was not completed to county specifications prior to Measure 49's effective date. Record at 2908.

## III. LEGAL BACKGROUND

Pursuant to ORS 34.040, this court reviews Respondent's decision on writ of review to determine whether, among other things, Respondent improperly construed the applicable law or made findings not supported by substantial evidence in the whole record. As alleged in the Petition for Writ of Review, Respondent misconstrued the applicable law and made findings not supported by substantial evidence in finding the applicants have a vested right to complete and



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continue a 15-lot residential subdivision under Measure 49. This section provides an overview of the applicable law relevant to this writ of review proceeding.

## A. Ballot Measures 37 and 49.

Oregon voters adopted Measure 37 (*former* ORS 197.352) by ballot initiative on November 2, 2004. Through that law, local governments and the State of Oregon issued orders granting "waivers" of particular land use regulations that enabled landowners ("applicants" or "claimants" under Measure 37) to pursue development of their property consistent with laws in force when the applicants first acquired the property. Under Measure 37, land use laws adopted subsequent to the claimants' land ownership could be "waived" to allow for development.

Measure 49 became effective on December 6, 2007. The purpose of Measure 49 was to "modify Ballot Measure 37 (2004) to ensure that Oregon law provides just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources." Measure 49 § 3(2). Measure 49 made this change by "narrowing the circumstances that trigger its remedies and limiting the scope of those remedies." *Frank v. Dep't of Land Conservation and Dev.*, 217 Or App 498, 503, 176 P3d 411 (2008). Claims under former Measure 37 were extinguished under Measure 49, with one exception—vested rights. *Frank*, 217 Or App at 505; *Corey v. DLCD*, 344 Or 457, 466-67, 184 P3d 1109 (2008). Measure 49 gave qualifying owners who made timely claims under former Measure 37 three options: an "express" pathway to develop up to three homesites, a "conditional" pathway to build up to ten homesites if the owner could prove a loss, and an option



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to demonstrate a vested right. Measure 49, Sections 5-8, *codified at* ORS 195.305 notes.

Section 5(3) of Measure 49 states that an applicant must have a "common law vested right . . . to complete and continue the use described in the waiver."[2] However, if the evidence is insufficient to demonstrate a vested right, the "waiver" orders issued by the State of Oregon and the local government under former Measure 37 are no longer valid and an applicant cannot continue with a claim under former Measure 37. *Frank*, 217 Or App at 503; *Corey*, 344 Or at 467. In sum, under Measure 49, an applicant may "complete and continue" a certain use of their property where: 1) the use complies with the waiver; and 2) the applicant has a "common law vested right."

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[2] Measure 49 Section 5(3) provides:

> A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:
>
> > ***
> > (3) A waiver issued before the effective date of this 2007 Act to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.

Oregon Administrative Rule 660-041-0060 clarifies that Measure 37 rights expired on December 6, 2007:

> Any authorization for a Claimant to use Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6, 2007, as did the effect of any order of DLCD denying a Claim. A Claimant may continue an existing use of Property that was authorized under ORS 197.352 (2005), or complete a use of Property that was begun prior to December 6, 2007 only if the Claimant had a common law vested right to complete and continue that use on December 6, 2007, and the use complies with the terms of any applicable DLCD Measure 37 Waiver.



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## B. The Common Law of Vested Rights.

The phrase "common law vested right" as used in Measure 49 refers to "broadly applicable legal precedents describing a property owner's rights when land use laws are enacted that make a partially finished project unlawful." *Corey*, 344 Or at 466. A vested right depends on:

> "[T]he degree of development which must exist before an owner of partially developed property can be said to have established a 'lawful use' of property under the statutes, so as to use the property as intended even though the use would not be permitted under the zoning law which became effective while the property was being improved."

*Polk County v. Martin*, 292 Or 69, 80, 636 P2d 952 (1981) (citing *Clackamas County v. Holmes*, 265 Or 193, 197 (1973) (*Holmes*)).

Prior to the adoption of Measure 49, the common law of vested rights was discussed in a series of cases in the late 1970s and early 1980s. *See, e.g., Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973); *Eklund v. Clackamas County*, 36 Or App 73, 583 P2d 567 (1978), overruled on other grounds, *Forman v. Clatsop County*, 63 Or App 617, 665 P2d 365 (1983), *aff'd* 279 Or 129, 681 P2d 786 (1984); *Cook v. Clackamas County*, 50 Or App 75, 622 P2d 1107 (1981); *Webber v. Clackamas County*, 42 Or App 151, 600 P2d 448 (1979); *Milcrest Corp. v. Clackamas County*, 59 Or App 177, 650 P2d 963 (1982); *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981); *Union Oil v. Clackamas County*, 81 Or App 1, 724 P2d 341 (1986). Under these cases, a "common law vested right" is generally established by the following factors:



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(1) *Expenditure Ratio*: Ratio of prior expenditures to the total cost of establishing the use;

(2) *Good Faith*: Good faith of the landowner in making the expenditures;

(3) *Notice*: Whether the landowner had notice of the proposed change in law before beginning improvements;

(4) *Adaptability*: Whether the expenditures are only for the desired use or could apply to various other uses of the land;

(5) *Use/location/cost*: The nature of the use, its location and ultimate cost; and

(6) *Mere Preparation*: Whether the owner's acts rise beyond mere preparation or contemplation.

*Clackamas County v. Holmes*, 265 Or 193, 198-99 (1973).

In *Friends of Yamhill County v. Board of Commissioners*, 351 Or 219, 264 P3d 1265 (2011) (*Friends*), the Oregon Supreme Court examined the meaning of the term "common law vested right" as used in section 5(3) of Measure 49. The Court confirmed the relevance and applicability of the *Holmes* factors, finding that no factor is any more material than any other, although the extent to which all factors apply will vary with the circumstances of each case. *Friends*, 351 Or at 242.

The *Friends* court also provided clarity on the interplay between the factors. First, the expenditure ratio factor "provides an objective measure of how far the landowner has proceeded towards completion of the construction." *Id.* This factor "provides the necessary starting point in analyzing whether a landowner has incurred substantial costs towards completion of the job, although the other *Holmes*



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factors will bear on whether the costs incurred are substantial enough to establish a vested right under section 5(3)." *Id.* at 242-43. To determine the ratio, the county must find two historical facts: (1) the costs incurred to construct the planned development, and (2) the estimated cost of the planned development. *Id.* at 246.

Second, "expenditures made in good faith and expenditures that relate to the project count, while expenditures made in bad faith and expenditures that could apply to other permissible uses of the land either do not count or are discounted in determining the existence of a vested right." *Id.* at 240. Regarding adaptability of expenditures, "[t]he question that the fourth *Holmes* factor asks is whether the expenditures the landowner has incurred relate to the proposed use and, if they do, whether those expenditures could be adapted to other permissible uses." *Id.* at 238-39. This is not the same as Measure 49's requirement that the use comply with the terms of the waiver. Even if the proposed use "complies with the waiver, it does not follow that all the expenditures either will relate to the use or could not be adapted to other uses." *Id.* Regarding good faith, expenditures made before the effective date of Measure 49 are not necessarily made in good faith. *Id.* at 241. It is up to the trier of fact to determine the good or bad faith of the landowner in making expenditures. *Id.*

The *Friends* court recognized, as *Holmes* did, that "there is no bright line for determining when an expenditure will be substantial enough to establish a vested right." *Id.* at 248 (citing *Holmes*, 265 Or at 197). For example, if the ultimate cost of developing a project were $1,000, a landowner who spent $200 would have incurred



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20% of the cost. However, few people would deem $200 a substantial expenditure. On the other hand, if the ultimate cost of a development project runs into the millions of dollars, then a smaller percentage may be significant. *Id. Holmes* and cases decided since then have found expenditures of 5.6 to 6.6 percent to be substantial expenditures. *See Holmes*, 265 Or at 196; *Friends of Polk County v. Oliver*, 245 Or App 680, 693, 264 P3d 165 (2011).

### C. Clatsop County Ordinance 08-06.

The Clatsop County Board of Commissioners adopted Clatsop County Ordinance 08-06 to implement Measure 49 Section 5(3). Record at 397-401. Ordinance 08-06 requires the County to consider all common law factors to determine whether the applicant has a vested right. Clatsop County Ordinance 08-06 § 5.01. The Director of Transportation and Development ("Director") makes the initial vesting determination. *Id.* § 2.01. The County Board of Commissioners ("County") hears any appeals of the Director's decision. *Id.* § 7. An applicant for a vested rights determination shall have the burden of proof of compliance with the criteria. *Id.* § 5.03 (Record at 401).

### D. Writ of Review Authority and Legal Standards.

A writ of review is a special statutory proceeding, formerly known as a writ of certiorari, wherein a circuit court reviews a quasi-judicial decision of a government tribunal for errors. ORS 34.010-.020. A circuit court may review the jurisdictional, procedural, legal and constitutional bases of the challenged decision, and determine whether the decision is supported by substantial evidence. ORS 34.040; *Alt v.*



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*Salem*, 306 Or 80, 84, 756 P2d 637 (1988). "Substantial evidence" in the context of a writ of review is "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant Velocity Corp. v. City of Aurora*, 136 Or App 81, 88, 901 P2d 258 (1995). Whether substantial evidence exists is a determination of a question of law for the court, to be determined on the record of the decision under review. *Alt*, 306 Or at 84.

Upon reviewing the decision and the record, the court may decide to "affirm, modify, reverse or annul the decision or determination reviewed, and if necessary, to award restitution to the plaintiff, or to direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision." ORS 34.100. The statute, however, does not set forth prerequisite findings for granting these various forms of relief. Unlike the Land Use Board of Appeals, the circuit courts do not owe deference to a local government's interpretation of its legislative land use enactments. *Sanchez v. Clatsop County*, 146 Or App 159, 163-64 n3, 932 P2d 557 (1997); *Clackamas County v. Marson*, 128 Or App 18, 23 n2, 874 P2d 110, *rev den*, 319 Or 572 (1994). Additionally, no statute or case directs the circuit courts to accord deference to decisions challenged by writ of review. *See Currier v. Clatsop County*, 149 Or App 285, 290, 942 P2d 847 (1997) (finding that court owed no deference to local government's ordinance interpretation in a writ of mandamus action, which shares characteristics of the writ of review).

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## IV. ARGUMENT

Respondent erred in finding the applicants have a vested right to complete and continue a 15-lot subdivision.

### A. Respondent Misconstrued the Law by Approving a Vested Right in a Development that was Never Proposed.

In *Friends of Yamhill County*, the Oregon Supreme Court clarified that a reviewing court must compare the landowner's expenditures to the costs (including construction costs) of constructing the development that was proposed on the effective date of Measure 49. *Friends*, 351 Or at 246. With respect to Clatsop County's review of the Aspmos' vested right claim, the Court of Appeals held that the county must "assess the total cost of the development, which necessarily includes building costs, that the Aspmos sought to vest as of December 6, 2007—the effective date of Ballot Measure 49 (2007)." *Oregon Shores*, 249 Or App at 535-36. Here, Respondent found the applicants had a vested right to complete a 15-lot subdivision, despite the fact that the applicants never proposed to construct a 15-lot subdivision. Respondent imagined a new subdivision plan, of its own accord, that it believed would satisfy the expenditure ratio for purposes of vesting. This is an incorrect interpretation and application of the law.

On July 29, 2014, the Apsmos submitted an application "for a determination that they have a vested right to complete and continue a 30-lot residential subdivision, with a dwelling on each lot, as allowed by a Measure 37 Waiver." Record at 3041. As the findings note, the applicants described their proposed development as follows:



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> As outlined in the Summary of Material Facts in the applicant's [sic] narrative, the applicants expended funds to obtain permits in furtherance of a 30-lot subdivision, cleared and graded the Property to support a 30-lot subdivision, drilled wells of sufficient size to support the first phase of a 30-lot subdivision, and installed internal roads of sufficient size and location to support a 30-lot subdivision.

Record at 2082.

Despite finding that the applicants' efforts were directed at a 30-lot subdivision, Respondent approved a vested right in a 15-lot subdivision. In order to do so, Respondent began its analysis with the allowable costs incurred (the numerator), then applied a ratio it believed would be accepted by reviewing courts, to determine the denominator (the total project cost). Record at 2080. Subsequent to their application for a determination of vesting in 30 lots, the applicants proposed a variety of differently-sized projects—12, 15, and 30 lots—"as alternatives for Respondent to approve." Record at 2154 (lines 21-22); 2358. In each of the applicants' alternatives, they include *all* of their expenditures as the numerator of the ratio. Record at 2358. In other words, the applicants assert that all of their expenditures count toward any configuration of residential lots, regardless of what was proposed on December 6, 2007 (the date the applicants must have a vested right).

The minutes of the hearing in this matter demonstrate Respondent's flawed analysis. During the hearing, Commissioner Rhone "asked if the [Aspmos] created a plan to adhere to the 5.6% ratio and present that to the county would this be acceptable. [Planner] Bunch said yes and explained that if the [Aspmos] lowered their lots to 12 or 15, this would raise the ratio." Record at 2153-54. This is not the


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analysis set forth in the common law or allowed by Measure 49. *Holmes* and *Friends* do not establish a process for identifying a project scope, size, or design. Rather, the common law provides a measure to determine "how far the landowner has proceeded towards completion of construction." *Friends*, 351 Or at 245. Rather than starting with a ratio and using that to determine the project, the county's role is to determine the ratio using the costs incurred compared to the total cost to construct the project proposed as of December 6, 2007. As explained in *Friends*, "[t]o determine the ratio, the county should have found two historical facts: (1) the costs that [the landowner] incurred to construct *the planned development* and (2) the estimated cost of *the planned development*." *Id.* at 246 (emphasis added).

Here, the county performed this analysis and found the applicants short – when compared to the planned development of the 30-lot subdivision, the applicants only completed 3% of the project.[3] Record at 2080. Respondent should have stopped at this conclusion and found the applicants had no vested right. Instead, Respondent reversed the ratio analysis, starting with a ratio it thought would be acceptable to reviewing courts and using that to invent a project that could be "vested." This approach misconstrues the common law of vested rights.

The applicants asserted that they could be vested in a portion of the project, relying on cases where a landowner was found to have a vested right in a particular phase of a development project. In *Friends of Polk County v. Oliver*, appellants

[3] This analysis includes the applicants' proposed development costs, which Oregon Shores contested as being well below actual development costs. Even assuming these low development costs, the Director correctly determined that the applicants' expenditures were not significant.



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challenged a Polk County decision finding that the claimant had a vested right to develop a 30-acre portion of a 137-acre tract. 245 Or App at 683. The proposed development in that case was proposed in phases:

> "The first phase was an approximately 30-acre subarea located in the southeast and east parts of the tract, including a portion of the frontage on Highway 22. That subarea was planned for retail commercial uses, including automobile sales. The later phases included areas for single-family and multi-family residences, office uses, and mixed office and light industrial uses."

*Id.* at 685. The court explained that by the effective date of Measure 49, the claimant asserted investments of "$1,927,648 toward completion of the entire development, of which $1,651,448 was allocable to the first phase." *Id.* The court concluded that because there was insufficient evidence of the nature of the build-out of the 107-acre portion of the property and its costs, the claimant did not prove a vested right to complete development of the entire parcel. *Id.* at 689. In upholding the vested right in the 30-acre phase, the court found that the "claimant did establish the expected costs of development of the subarea" and the claimant identified the costs incurred towards the completion of that phase that demonstrated a vested right in that 30-acre subarea. *Id.* at 690.

Here, the applicants' 30-lot subdivision included three phases. Record at 29. None of the phases individually or in combination results in a 15-lot subdivision. *Id.* In pursuing their vested right claim, the applicants expressly rejected any interest in a vested right in a particular phase of development. Record at 2088, 2195. Unlike the claimant in *Oliver*, the applicants here allege that all of their expenses incurred apply to the entire 30-lot subdivision. Record at 2358. They point to no "subarea" or



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"phase" of the development proposed as of December 6, 2007 in which they may have a vested right by comparing costs incurred towards completion of that area or phase as compared to the costs of developing that phase or area. Instead, Respondent simply imagined an entirely new development (with new conditions of approval) for the entire property, one that it believed would support a vested rights approval. This analysis turns the vested rights expenditure ratio on its head, and undermines the key holding of *Friends* that requires analysis of the cost of developing the project that was proposed as of December 6, 2007.

### B. No Evidence in the Record Indicates that the Applicants Ever Proposed to Develop a 15-lot Subdivision.

In considering whether the applicants incurred substantial costs towards completion of the proposed development, Respondent was required to find two "historical facts": (1) the costs that the Aspmos "incurred to construct the planned development and (2) the estimated cost of the planned development." *Friends*, 351 Or at 246. As the trier of fact, it was Respondent's job "to decide by a preponderance of the evidence what the estimated cost of constructing the planned homes was." *Id.* at 247. As discussed above, Respondent found these facts and concluded that the applicants had completed only 3% of their proposed 30-lot subdivision. Rather than denying the application based on the common law vesting analysis, Respondent reversed the expenditure ratio process to invent a new project, without any evidence in the record to support it.

"Substantial evidence" in the context of a writ of review is "evidence that a reasonable person could accept as adequate to support a conclusion." *Constant*


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*Velocity Corp.*, 136 Or App at 88. In this case, no evidence in the record supports a conclusion that the applicants planned to develop a 15-lot subdivision. The record includes the preliminary plat approved by Clatsop County for a 30-lot subdivision. The approved preliminary plat identifies "Phase I" as lots 1-5, "Phase II" as lots 6-18, and "Phase III" as lots 19-30. Record at 29, 540. There is no plan, plat, or other evidence in the record showing a proposed 15-lot subdivision. As there are no "historical facts" to support a 15-lot subdivision, Respondent's conclusion that the applicants have a vested right to complete and continue a 15-lot subdivision requires reversal.

### C. Respondent Misconstrued the Law Regarding Adaptability of Expenditures. The Decision is not Supported by Substantial Evidence.

Respondent erred in failing to discount or exclude from the ratio expenditures that could be adapted to other permissible uses of the property. Under *Friends*, adaptable expenditures are either not counted or discounted from the expenditure ratio. In addition, Respondent erred in placing the burden of proof on Oregon Shores to demonstrate that costs are adaptable to other uses. In demonstrating a vested right, the applicants bear the burden of proof, not the challenger.

#### 1. First Sub Assignment of Error: Respondent Misconstrued the Law by Failing to Exclude or Discount Costs Incurred which Could be Adapted to Other Permissible Uses of the Property.

In *Friends*, the Supreme Court explained the fourth *Holmes* factor as follows:

> The question that the fourth *Holmes* factor asks is whether the expenditures the landowner has incurred relate to the proposed use and, if they do, whether those expenditures could be adapted to other permissible uses.



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> [E]xpenditures that could apply to other permissible uses of the land either do not count or are discounted in determining the existence of a vested right.

*Friends*, 351 Or at 239-40. Below, Oregon Shores argued that many of the applicants' expenditures could be adapted to other permissible uses of the property, including uses allowed under the current zoning, or the up to three homes that could be developed under the "express" option of Measure 49. Record at 2328, 2331. The well and septic approvals could be adapted to the development of three homes on the property. The access road could service three homes as well as it could serve the 5 homes of phase 1 of the development. *See* Record Oversize Exhibits 6-7 (showing proposed roads and clearly identifying Phase 1 of the project). The land clearing and grading on the land could be adapted to agricultural activities as a permitted use.

Oregon Shores asserts that the following adaptable expenses in the amount of approximately $150,000 should be deducted from the numerator of the ratio:

- $28,200.00 paid to Gary Aspmo LLC for project management and land clearing.
- $1,365.00 paid to Precision Pump for one well.
- $545.00 paid to Bergeson Construction for test holes.
- $4,350.00 paid to K.E. Ness Logging & Construction for timber harvest.
- $23,555.00 paid to North Pacific Excavation and Land for equipment and excavation.
- $92,064.59 paid to Big River Construction for road construction.

*See* Record at 2894-95 (applicants' timeline of expenditures). The remaining costs for legal, survey and planning work may also be adaptable, but without the applicant providing more detailed information regarding the specifics of those costs,



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it is unclear whether those costs could be adapted to other legal uses of the property. *See* Record at 2560.

Respondent concluded that the applicants' expenditures, with the single exception of timber harvest costs, were not to be discounted or excluded from the numerator as adaptable expenditures. Record at 2078. Respondent concluded that all of the applicants' expenditures could be adapted to a 12 or 15 lot subdivision, but that *none* of these expenditures could be adapted to a 3-lot subdivision. There is no legal or evidentiary support for this distinction. The applicants presented no evidence demonstrating that the expenses incurred could not be adapted to the three homes allowed under the "express" Measure 49 option, while at the same time asserting that *all* of their expenses should count towards (i.e., can be adapted to) a newly imagined 12 or 15 lot subdivision. Record at 2358, 3056.

Respondent misconstrued the law of vested rights, concluding that "expenses that could apply to an alternative development are not to be deducted from the numerator in calculating the expenditure ratio." Record at 2078. This analysis entirely contradicts the Supreme Court's statement in *Friends* that expenditures which could apply to other permissible uses of the land "either do not count or are discounted in determining the existence of a vested right." *Friends*, 351 Or at 240. Respondent misconstrued the adaptability factor as requiring a determination of "whether the expenditures are more consistent with the proposed use than with other allowed uses in the zone." Record at 2082. The vested rights analysis requires a subsequent inquiry: whether those costs could be adapted to other permissible



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uses. Respondent erred in failing to consider whether the applicants' expenditures such as road grading, land clearing, and well drilling could be adapted to other permissible uses of the property, and therefore excluded or discounted from the expenditure ratio in accordance with *Friends*. Further, no evidence in the record supports a conclusion that these expenditures are not adaptable to another lawful use of the property.

**2. Second Sub Assignment of Error: Respondent Erred in Placing the Burden of Proof. The Applicant Bears the Burden of Proof to Establish the Vested Right Sought.**

Both the Clatsop County Ordinance and the common law of vested rights place the burden of proof on the applicant for a vested rights determination. Clatsop County's vested rights determination ordinance provides that an applicant for a vested rights determination "shall have the burden of proof of all matters asserted in an Application, and of compliance with the criteria in this Section 5 [of Ordinance 08-06]." Clatsop County Ordinance 08-06 (Record at 401). The Court of Appeals has explained that, "[g]enerally, nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation. Accordingly, one who claims a nonconforming use bears the burden of proving the facts upon which the right to such a use is based." *Webber*, 42 Or App at 154 (citing *Clackamas Co. v. Portland City Temple*, 13 Or App 459, 462, 511 P2d 412, *rev den* (1973) and 1 Anderson, The Law of Zoning, § 6.09 (1976)).

In considering whether the applicants' expenditures here could be adapted to other permissible uses, Respondent found that Oregon Shores "simply has not met



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its burden of undermining the applicants' testimony in this case." Record at 2083. This finding improperly places the burden on Oregon Shores to prove that the applicants' expenditures could be adapted to other permissible uses. Respondent accepted the applicants' list of expenditures including "excavation and equipment" as not adaptable to other uses without any evidence in support, and instead placed a burden on Oregon Shores to "undermine" this list of expenditures.

Respondent erred in considering only whether expenditures were "more consistent" with the proposed development than other permissible uses, and in failing to place the burden of proof on the applicants to demonstrate that expenditures are not adaptable to other permissible uses of the property. Once those adaptable expenditures are subtracted from the numerator, they do not amount to even the three percent of the total project cost that the Planning Director found to be insufficient to vest the right. As a result, the court should reverse and remand the decision.

### D. Respondent Misconstrued the Applicable Law in Determining that the Non-Conforming Use has not been Discontinued.

Respondent misconstrued the law regarding discontinuation of nonconforming uses. A nonconforming use is a use that was lawfully established but no longer complies with the local zoning code because of a change to the relevant code. ORS 215.130(5). Oregon courts have characterized a vested right as a species of nonconforming use. *See Fountain Village Development Co. v. Multnomah County*, 176 Or App 213, 221, 31 P3d 458 (2001), *rev. denied*, 334 Or 411, 52 P3d 436 (2002). (characterizing a vested right as an "inchoate" nonconforming use subject to loss by


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discontinuation). If the land was under development when the code changed, the owner may have a vested right to complete construction, at which time the project would become a valid nonconforming use. *Id.* Section 5.618 of the Clatsop County Land and Water Development and Use Ordinance (LWDUO) provides: "[i]f a non-conforming use is discontinued for a period of one year, subsequent use of the property shall conform to this ordinance."

ORS 215.130 establishes the loss of right to resume a nonconforming use after its discontinuation. *See* ORS 215.130 (5) [4], (7) [5], (9).[6] The Oregon Court of Appeals confirmed the relationship between ORS 215.130(7) and county discontinuation ordinances in *City of Mosier v. Hood River Sand Gravel and Ready Mix, Inc.*, 206 Or App 292, 306, 136 P3d 1160 (2006). After a thorough review of legislative intent the appellate court held that ORS 215.130(7) applies to counties. *Id* at 310. Accordingly, the application of ORS 215.130(7) to the counties combined with the specific limit of

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[4] ORS 215.130(5): The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215 (Reestablishment of nonfarm use), a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

[5] ORS 215.130: (7) (a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

[6] ORS 215.130 (9): As used in this section, alteration of a nonconforming use includes:
(a) A change in the use of no greater adverse impact to the neighborhood; and
(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.



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one year implemented by LWDUO 5.618[7] leads to the conclusion that applicants had one year from the time of the remand to file for a vesting determination.

Here, the applicants received a state and a county waiver in 2005 for a nonconforming use subsequent to the passage of Measure 37. *See* Record at 18. In 2008, the applicants applied for and were granted a vested rights determination under Measure 49, for the 30 lot proposed development. Record at 27. After much litigation, the decision was remanded back to the county in 2012, at which point the applicants had one year as prescribed by LWDUO section 5.618 and ORS 215.130(7) to take affirmative steps to continue the vested right. The applicants failed to pursue the project until July 2014 – 22 months after the remanded decision – when they submitted additional material in support of the application. Record at 3037.

Instead of applying the time limit for discontinuation of a nonconforming use, Respondent found that "[t]here has never been a final decision establishing a lawful nonconforming use, inchoate or otherwise, that could be discontinued." Record at 2091. In other words, Respondent assumes that a vested right can be discontinued only after it has been verified or approved. This finding misconstrues the law.

The Oregon Court of Appeals has held that a vested right to construct a nonconforming use may be lost by discontinuation or abandonment. *Fountain Village*, 176 Or App at 224. The court held that a vested right in a nonconforming use does not immunize that use from the controls authorized under ORS 215.130,

[7] Section 5.618 of the Land and Water Development and Use Ordinance:
> "[i]f a non-conforming use is discontinued for a period of one year, subsequent use of the property shall conform to this ordinance."


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*Id.* at 224, because applicable state and local rules on discontinuation and abandonment apply with equal force both to established nonconforming uses and to vested rights to complete and continue a nonconforming use. *Id.* at 219 ("Oregon courts have consistently treated a vested right as a nonconforming use….") (internal quotations omitted) (citing *Clackamas Cnty. v. Holmes*, 11 Or App 1, 501 P2d 333 (1972), *rev'd on other grounds* 265 Or 193, 508 P2d 190 (1973)).

*Wal-Mart Stores, Inc. v. City of Hood River et al*, LUBA No. 2015-004 (July 8, 2015) (Affirmed without opinion, 274 Or App 261 (2015) (Mem.)), involved similar facts and interpretations as those presented here. Wal-Mart had received approval in 1991 from Hood River to construct a 72,000-square-foot commercial retail store and for a future expansion comprising 30,000-square-feet. LUBA noted that the "1991 site plan approval had no expiration date or conditions requiring construction within any particular timeframe." Opinion at 3:19-21. Similarly, Respondent here noted that Measure 49 does not provide a time limit for vesting determinations. LUBA also noted, "[i]n 1997, the city amended the LI [light industrial] zone to prohibit commercial uses, making the existing store a nonconforming use." Opinion at 3:22-25. Likewise, Measure 49 rendered the Aspmos' proposed use nonconforming, triggering the application of ORS 215.130 and LWDUO 5.618.

LUBA held that Wal-Mart's non-conforming use in the right to construct the 30,000 square-foot expansion of its Hood River retail store had lapsed because Wal-Mart failed to construct the expansion within 12 months after the expansion right became a non-conforming use. LUBA held that the discontinuance provisions apply



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to invalidate a vested right to develop a non-conforming use if the applicant does not diligently pursue that use. LUBA explained:

> Depending on the facts, it is entirely possible for a nonconforming use to be discontinued or abandoned prior to the date that the applicant seeks a verification of the lawful existence and scope of the nonconforming use, and prior to the date the local government issues a decision verifying the lawful existence and scope of the nonconforming use. Opinion at 15:2-6.

LUBA's ruling is instructive with regard to the present case. Here, the applicants delayed pursuing their claim for a vested right by not applying for substantially longer than 12 months after the case was remanded. The applicants waited 22 months before further pursuing their project. Record at 2027. As explained in *Wal-Mart*, a nonconforming use can be discontinued prior to the date that the applicants seek a verification of that use or the date that a local government issues a decision verifying the existence of the vested right. In other words, it does not matter whether the local government has verified a nonconforming use – that use can be discontinued.

Under Measure 49, any right to complete and continue a use pursuant to a Measure 37 waiver must be vested as of December 6, 2007. Section 5(3) allows continuation and completion of a development pursuant to a Measure 37 waiver if "the claimant has a common law vested right on the effective date of this 2007 Act." Measure 49 explains that a vested right to complete and continue development pursuant to a waiver either exists, or does not, on the effective date of Measure 49 (December 6, 2007). A verification of a vested right is just that – a verification – a county decision does not create a vested right. *See* ORS 215.130(8) (a "proposal for


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the verification or alteration of a use under subsection (5) of this section" is subject to ORS 215.416 permit requirements). Here, the applicants did not take action to pursue their alleged use for almost two years. Therefore pursuant to ORS 215.130(7) and LWDUO 5.618, the applicants discontinued any vested right they may have had.

### E. Respondent Erred in Concluding that the Use complies with the Waiver.

Measure 49 Section 5(3) limits the scope of the use that can vest "to the extent that the claimant's use of the property complies with the waiver." Respondent concluded that the use sought complies with the terms of the applicants' waivers under former Measure 37. In so finding, Respondent's order states, "we decline to read into the State Waiver requirements that would frustrate its express purpose." Record at 2075. The State Waiver expressly waived only Goal 4, ORS 215.705 through 215.755 and ORS 215.780, and OAR 660-06-0026 through 660-06-0055. Record at 335, 1683. The State Waiver did not waive Goal 10 (housing) or Goal 11 (public facilities) or Goal 14 (urbanization).

Assuming a validly issued waiver, the applicants' ability to be vested must be read in light of limitations in the waiver itself. The vested use cannot exceed the terms of the waiver orders issued by the State or the County, or violate any land use laws that were not waived. The use sought here does not comply with the terms of the waiver, which only waived Goal 4 and did not waive Goals 10, 11, or 14. Goal 10 population policies apply to this development. The use sought here does not comply with Goal 10 population policies. The Staff Report for the subdivision application



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states, "[i]f the application were evaluated for conformance with the relevant population policies of Goal 10 of the Comprehensive Plan, it would be found to be deficient and residential subdivision of the land would necessarily be denied." Record at 520.[8] The planning staff reached the same conclusions with respect to Goal 11 public facilities policies and again for applicable Goal 14 urbanization policies. Record at 522, 529. The applicants' waiver did not waive provisions of Goals 10, 11 and 14. County planning staff determined that the preliminary plat would not comply with applicable requirements of those goals. The record here demonstrates that the use does not comply with the terms of the waiver, which only waived Goal 4, and therefore the applicants cannot be vested under Measure 49 § 5(3).

**F. Respondent Misconstrued the Use/Location/Cost Factor.**

This factor favors developments which do not conflict with the neighboring environment, and where the property is well suited to the proposed use. *Union Oil v. Clackamas County*, 14 Or LUBA 719, 727-28 (1986); *Cook*, 50 Or App at 82 n.4. The Clatsop County Planning Director and planning staff found that the applicants' property is surrounded predominantly by large parcels of AF (Agricultural-Forestry) and F-80 (Forestry – 80 acre) zoned property. Record at 24, 83. Zoning maps of the area confirm these findings. *See* Record at 30, 311, 1273-77 (vicinity maps for subject property). In reversing the Director's findings on this factor, Respondent concluded that the proposed use is part of an "urbanizing corridor of the county."

[8] Instead of denying the application, the County decided the application would "not be assessed for consistency" with Goal 10 provisions. *Id.*



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Record at 2085. In fact, though one residential development of similar density to that proposed by the applicants abuts the property to the west, in other directions Respondent considered developments a quarter mile away. These existing developments do not represent an "urbanizing corridor" where the applicants' property is almost completely surrounded by resource-zoned land. *See* Record at 294, 1278-1280, 2025 (aerial photos of property and vicinity showing area as almost entirely forested).

Further, Respondent assumed that because there are other residential uses in the general vicinity, there is no conflict between this proposed use and the existing nearby uses. However, residential uses often do conflict with forestry uses, which can involve activities such as aerial spraying and burning operations unpleasant to nearby neighbors. Even those existing residential areas may find that conversion of resource lands to residential subdivisions eliminates open space, impacts traffic flow, and causes other negative impacts to water and infrastructure that may very well conflict with those existing nearby uses.

Respondent failed to consider impacts of the proposed use to services and infrastructure, traffic and roads – all relevant to determining whether a use conflicts with the neighboring environment. The Planning Director properly concluded that the applicant did not satisfy this factor because nearby and adjacent properties are designated for farming and forestry uses that could conflict with the applicants' residential subdivision. Record at 2391. The court should reverse and remand Respondent's decision on this factor.



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## V. CONCLUSION

For the foregoing reasons, this court should hold as a matter of law that Respondent Clatsop County improperly issued the Decision finding the applicants were vested in a 15 lot subdivision. Oregon Shores respectfully requests that this court issue an order that the applicants are not vested because (1) they failed to incur substantial expenditures toward completion of the planned development on December 6, 2007, (2) the use does not comply with the terms of the waiver, and (3) the applicants discontinued any vested right they may have had by failing to take actions toward completing the use for a period of more than one year.

DATED: July 13, 2016

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I caused to be served by CM/ECF and first class mail, a copy of the foregoing PETITIONER OREGON SHORES CONSERVATION COALITION'S OPENING BRIEF / HEARING MEMORANDUM on:

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In addition, I hereby certify that I caused to be served by electronic and first class mail, a copy of the foregoing on counsel for the parties of the consolidated case in this matter, Case No. 16CV09739:

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