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,

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

Intervenors-Defendants.

AND

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

Petitioner-Plaintiff,

v.

CLATSOP COUNTY,

Respondent-Defendant,

Case No. 16CV09677
(Consolidated)

PETITIONER OREGON SHORES CONSERVATION COALITION'S REPLY BRIEF

Case No 16CV09739
(Consolidated)

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OREGON SHORES' REPLY

Petitioner Oregon Shores Conservation Coalition provides this reply to Intervenor-Respondent Aspmos' arguments in support of the decision approving a 15-lot subdivision as a vested right under Ballot Measure 49.

1. Partial Vesting

Intervenors acknowledge the project they sought to vest was a 30-lot subdivision, but argue that Respondent correctly "found that the Aspmos only acquired a vested right to a portion of the same project they proposed on the effective date" of Measure 49. Int. Br. at 11. In support of their partial vesting argument, Intervenors cite *Friends of Polk County v. Oliver*, 245 Or App 680, 264 P3d 165 (2011) and *Milcrest Corp. v. Clackamas County*, 59 Or App 177, 183, 650 P2d 963 (1982). These two cases are distinguishable from the facts here because in each of those instances, the reviewing court identified a specific and particular part (whether it was called a "phase" or "subarea" – the name is unimportant) of the proposed development that was separately pursued and could be evaluated independently against the vesting factors. Here, Respondent did not identify a specific part of the development proposal (such as a specific set of lots according to a plat in the record) that the Intervenors pursued independently prior to the effective date of Measure 49 and to which expenditures could be attributed and total costs could be evaluated under the common law vesting factors.

In *Oliver*, the hearings officer determined the claimant established a vested right to complete "the project undertaken as phase one of the development." *Oliver*,

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245 Or App at 686. Phase one was a "30-acre subarea located in the southeast and east parts of the tract … planned for retail commercial uses." *Id.* at 685. The claimant established $1,651,448 in expenditures "allocable to the first phase" and the total cost "of building phase one, including streets, utilities, and building shells, was $18,304,839." *Id.* In *Milcrest*, the plaintiff initially obtained approval for development on 440 acres, then subsequently acquired options or contract interests in an adjacent 220 acres. The plaintiff obtained a preliminary plat approval the additional 220-acre area, but later lost its options in that parcel. *Milcrest*, 59 Or App at 179-80. The court found that the "vast preponderance of plaintiff's design and engineering expenditures, and virtually all the construction expenditures, were exclusively referable to the original 440 acres." *Id.* at 182.

In both *Oliver* and *Milcrest*, the person asserting the vested right identified: 1) a particular land area (30 acres, 440 acres), 2) a particular development proposal for that land area (Phase one in *Oliver*, and the 440-acre subdivision preliminary plat in *Milcrest*) that the person had been pursuing prior to the change in law, and 3) a particular set of expenditures that were attributable to that delineated portion of the development project, such that the specific sub-area could be identified and analyzed under the common law vesting factors. In contrast, Respondent's findings in this case do not identify any of these three pieces of information that would allow the application of the common law vesting factors.

First, Respondent did not identify the land area where a new 15-lot development would be placed, and for which expenditures and costs could be evaluated under the

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common law vesting factors. The record contains no evidence from before the effective date of Measure 49 showing a plan to pursue part of the larger development, nor is there any detail on where, what size, and how the 15 lots will be arranged and on what portion of the property. Respondent did not adopt any findings that indicate whether the 15 lots would be spread across the entire property or contained within a subarea. The only clue in the findings as to where the 15-lot development might occur is in the condition of approval requiring that the "15 residential lots shall be located on the eastern portion of the Property and shall be at least two acres in size." Rec. at 2092. Respondent did not identify a portion of the land to which Intervenors' development activities and expenses can be singularly attributed and evaluated for a vested right, as was the case in *Oliver* and *Milcrest*.

Second, the record contains no preliminary plat or other plan that would support application of the common law vested right factors to a 15-lot development. *See* Oregon Shores' Hearing Memo at 19-20. Intervenors acknowledge that they do not have a plat showing the layout of a 15-lot development. Int. Br. at 15. Intervenors nevertheless repeatedly refer to "*the* 15-lot development" as if there were actually some evidence of what that development would entail. *See* Int. Br. at 13 (emphasis added). Contrary to Intervenor's assertions, Respondent did not conclude that Intervenors established a vested right in lots 1-15 of the preliminary plat. Respondent instead concluded that, "the applicants have acquired a vested right to complete and continue 15 lots, each with a dwelling, in the subdivision." Rec. at

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2080. These lots are not identified on any plat or plan as evidence of what the applicants were working toward completing when the law changed. *See Friends*, 351 Or at 246.

Third, the applicants have not identified and Respondent did not adopt findings regarding a specific set of expenditures that were incurred towards the development of a 15-lot subdivision. Respondent's findings apply the cost to develop each home adopted in the vesting analysis for the 30-lot subdivision, plus a "pro rata share of the costs to develop the lots and utilities" for the 30-lot subdivision. Rec. 2080. Respondent "agree[d] with the applicants that the evidence in the record amply demonstrates that the expenses they incurred to construct the subdivision apply to the entire subdivision and not a single phase." Rec at 2088.[1]

Intervenors assert that Respondent correctly evaluated costs because it did not include development of Gelin Court which only serves Phase III, and did include the "lot-specific expenses relate to Phase I, which is included within the 15-lot development." Int. Br. at 13. These flawed arguments misrepresent the facts by suggesting that the record demonstrates that Phase I will be included in, or that Phase III will be excluded from, a 15-lot development. Respondent's findings do not identify whether any of the lots in the current preliminary plat would be included in the yet-to-be created 15-lot subdivision, let alone identifying specific lots that can be

[1] Several of the expenses were in fact specific to Phase I of the development, including the wells and septic testing and permitting. *See* Rec. 2861-70 (field evaluations for Phase I); Rec. 2076 (Respondent's findings adopting applicant's explanation that wells were drilled "appropriate to serve Phase I of the Subdivision"). As discussed, the findings do not conclude or require that Phase I will

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developed as including Phase I lots and excluding Phase III lots. Respondent did not conclude that Intervenors were vested in lots 1-15 of the current proposed subdivision.

Because nothing in the record nor in the findings indicates that a new 15-lot development would be in any way based on the current preliminary plat, Respondent erred in assuming that any and all planning costs associated with the approval of the 30-lot preliminary plat could be attributed (pro-rata) to a 15-lot development. These costs include at least $30,160.00, assuming that survey work could be applied to a new subdivision layout. Rec. 2896 (Otak invoice itemizing plat production). Likewise, because there is no plat showing what roads would be used or where utilities would need to be installed to serve a 15-lot development, Respondent could not assume that these prior costs incurred could be attributable to a new, as yet undefined, project. These costs were not incurred toward the approval of a new 15-lot subdivision and therefore cannot be counted towards the completion of the project in the expenditure ratio.

Similarly, a 15-lot subdivision will require new planning work in order to identify where, what size, and how the 15 lots would be located. According to Intervenors, without citation to the record or to the law: "The County will review the final lot configuration in conjunction with approving the final plat for the Property." Int. Br. at 15. To the contrary, the applicants would likely be required to submit a new preliminary plat because the layout will have changed substantially. *See* Clatsop County Land and Water Use Development Ordinance Sections 5.226,

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5.228 (describing "minor amendments" as "slight alterations in lot lines" and making a preliminary plat binding "provided that there are no changes of the plan of the subdivision, and that it complies with all conditions"). Respondent failed to include the additional costs of preparing new plats as part of the total project cost for a 15-lot subdivision.

Intervenors point to no prior case where a court approved a partial vested right based on a newly conceived smaller project that was not pursued prior to the change in law. Intervenors point to no case where a court evaluated a vested right claim based on a pro-rata share of expenditures attributable to an entire project. And Intervenors point to no case where an unidentified portion of a development project was permitted to be later defined so a person could be found to have secured a vested right. Intervenors ask this Court to create a new analysis that allows a claimant who has failed to demonstrate that they have proceeded far enough in completing the project they sought to vest as of the effective date of Measure 49, to nevertheless be vested in some portion of the total project that is not evidenced by any plat or plan. No Oregon court has ever approved this analysis, and this Court should not adopt this approach here.

2. Adaptability of Expenditures

Intervenors allege that Oregon Shores misconstrues the law regarding adaptable expenditures, as set forth in *Friends of Yamhill County v. Bd. of Commrs*. Int. Br. at 17-18. In so arguing, Intervenors simply ignore the *Friends* holding that "expenditures made in good faith and expenditures that relate to the project count,

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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." *Friends,* 351 Or 219, 240 (2011).

Intervenors instead rely on language in *Friends* discussing *Holmes* and explaining that the *Holmes* court rejected an approach that would make "the entire vesting decision turn on the resulting ratio." *Id.* at 237. Intevenors' brief selectively quotes from a more extensive discussion that starts with an explanation of a New York case that looked "solely to 'the ratio of expenses incurred to the total cost of the project' in deciding whether the expenses incurred were substantial, and it had reasoned that only those expenses that related 'exclusively' to the proposed development should be considered in determining the ratio." *Id.* at 237. The quoted portion of the decision in Intervenors' brief is a discussion of prior case law, not a holding. And this section does not, as Intervenors suggest, mean that adaptability of expenditures is unrelated to the ratio factor.

Following the discussion of prior case law cited by Intervenors, the *Friends* court interpreted Measure 49 as follows:

> "[T]he phrase 'a common law vested right' refers to a body of substantive common law that identifies which expenditures count in determining whether a landowner has a vested right to complete construction and which do not. Under the common law, 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. *See Holmes*, 265 Or at 198.99.

Id. at 240. Whether the "expenditures that could apply to other permissible uses of the land" are excluded from the expenditure ratio or later and separately excluded is of no import. This Court must follow and apply *Friends*' direction that

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"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." *Friends*, 351 Or at 240.

Intevenors assert that Respondent adopted "alternative findings" that Petitioner failed to challenge, and therefore Petitioner has provided no basis to reverse or remand the decision. Int. Br. at 19. Aside from the fact that Intervenors offer no legal authority for this assertion, the argument fails because Petitioner did challenge the "alternative" analysis adopted by Respondent. Petitioner's Hearing Memorandum argued that "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." Hearing Memo at 22. In the so-called "alternative findings," Respondent states that, "the expenses that are claimed are actually for the use for which a vested right is sought as opposed to some other, unrelated use." Rec. at 2084. This "alternative" analysis is no different than that challenged by Petitioner. As explained here and in Petitioner's Hearing Memorandum, Respondent's analysis misconstrues the common law as set forth in *Friends*.

3. Discontinuance

Intervenors suggest that the Yamhill County letter opinion in *Johnson* is "the most relevant, current, and informative appellate decision" on the issue of discontinuance. Int. Br. at 20. Of course, the Yamhill County Circuit Court is not an appellate court and its decisions are not binding precedent or authority on this

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Court's decision in this case. The *Johnson* decision is currently on appeal at the Court of Appeals, but at this stage there is no appellate authority for the analysis adopted by the Yamhill Court or that adopted by Respondent in this case.

Furthermore, another case from the same Yamhill Circuit Court arrived at exactly the opposite conclusion regarding discontinuance. In *Friends of Yamhill County v. Bd*, Yamhill County Circuit Court Case No. 14CV14861 (Aug. 29, 2016) ("*Gregg*"), Judge Stone concluded that as a matter of law the local one-year discontinuation policy "applies to non-existing vested rights" and that the claimants "have lost any right to continue the inchoate nonconforming use they claim is vested by waiting nearly three years after remand to file a vesting application with the county." *Gregg*, letter opinion at 5-6. Judge Stone found that the Court of Appeals decision in *Fountain Village Development Co. v. Multnomah County*, 176 Or App 213 (2001) is controlling. Similarly, this is a case of "discontinuation," which only requires a legal conclusion that the Intervenors did nothing to finish the development for over one year. As the Court of Appeals stated in *Fountain Village*, "one may secure a vested right to construct a nonconforming use, but there is no reason to afford that right different or greater protections than the ultimate use itself." *Fountain Village*, 176 Or App at 223.

Intervenors suggest that *Fountain Village* does not apply to the facts here because in that case the landowners had a valid permit and a period of time after the nonconformity occurred to take "on the ground" steps to complete the use. Int. Br. at 21. Intervenor's use of quotation marks around the words "on the ground"

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implies that the court in *Fountain Village* used that phrase. But the phrase does not appear anywhere in the *Fountain Village* decision and nothing in the decision explains or limits actions taken towards completion of development to "on the ground" activities. Similarly, in *Wal-Mart Stores v. City of Hood River*, the city's findings and LUBA's decision did not set out any requirement for "on the ground" action for taking steps to complete and continue a use. In fact, the city's findings were very broad, "Wal-Mart never began *action of any discernible form* to activate its 'future expansion' until this 2011 application, which raises the question of what was 'discontinued' within the meaning of [the local code]." 72 Or LUBA 1, 7, *aff'd without opinion*, 274 Or App 261 (2015)(emphasis added). On review, LUBA did not address the action required to avoid discontinuance and did not set out any "on the ground" requirement as suggested by the Intervenors here.

Intervenors suggest that they could not have taken steps towards completing their proposed development and that any "on the ground" activities after the effective date of Measure 49 "would have been perceived to be bad faith." Int. Br. at 21. Intervenors once again provide no authority for this assertion. To the contrary, whether a landowner's actions demonstrate bad faith is a factual determination left to a trial court. The *Friends* court noted:

> "Specifically, the trier of fact could find that expenditures made after the voters adopted Measure 49, to 'thwart the legislative act' were made in bad faith. Conversely, nothing precludes a trier of fact from finding that expense planned before the voters approved Measure 49 but incurred after its passage but before its effective date were not made to thwart the measure. We need not attempt to catalogue the various ways in which a trier of fact could conclude that costs were incurred in either good or bad faith."

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Friends, 351 Or at 241-42. While costs incurred after the effective date would not count toward a vested right, there is nothing to suggest that post-Measure 49 expenditures or activities would automatically demonstrate bad faith. Intervenors' attempt to distinguish *Fountain Village* and *Wal-Mart Stores* fails.

4. Compliance with Waivers

Intervenors assert that Petitioner failed to preserve its challenge regarding compliance with the waiver. Intervenors offer an unsupported "policy justification" for the sufficient specificity requirement in ORS 195.318(3)(b). Int. Br. at 23. Contrary to Intervenors' own policy analysis, the Court of Appeals has explained that this language requires no more than "fair notice." *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). The ORS 195.318(3)(b) requirement to raise issues with "sufficient specificity" before the local decision maker mirrors the "raise it or waive it" provision of Oregon's land use statutes. *See* ORS 197.763(1) (requiring that "issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, * * *, and the parties an adequate opportunity to respond to each issue"). As the Court of Appeals has explained:

> "ORS 197.763(1) does not simply require 'sufficient specificity,' but goes on to define what the objective of the requisite specificity is, *i.e.*, to afford the decisionmaker and the parties 'an adequate opportunity to respond to each issue.' The plain thrust of that language is that the statute requires no more than fair notice to adjudicators and opponents, rather than the particularity that inheres in judicial preservation concepts. Indeed, there would have been no need for the second sentence in the statute if the strict preservation principles that petitioner urges had been intended."

Boldt, 107 Or App at 623. Petitioner's comments before Respondent provided fair notice that Petitioner challenged compliance with the waiver including compliance

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with Goals 10, 11, and 14 because those Goals were not waived by the state. Nothing more is required to find that the use does not comply with the waivers.[2]

Intervenors next argue that Petitioner's challenge is a collateral attack on the subdivision approval. Int. Br. at 24. As discussed above, the applicants will be required to submit a new subdivision application for a new 15-lot development. At that point, Intervenors presumably would argue that any further challenge is a collateral attack on the vested right determination. Measure 49 requires that a use sought to be vested must comply with the terms of the waiver, and it is incumbent upon the applicant to prove such compliance in order to establish a vested right.

Next, Intervenors argue that the Staff Report does not address statewide planning goals, but only county planning goals. Int. Br. at 25. The Court of Appeals has explained the relationship between statewide goals and local goals:

> "In 1973, Oregon adopted its statewide land use planning program. To establish and implement statewide policies, the legislature created the Land Conservation and Development Commission (LCDC). LCDC implements statewide policies through the adoption of land use planning standards, or goals. Those state-wide planning goals are mandatory and binding on local governments. ORS 197.015(8). Local governments are required to adopt comprehensive plans that comply with the statewide goals and must submit those plans to LCDC for review. * * * If LCDC concludes that the comprehensive plan complies with the statewide goals, it acknowledges the plan, which then allows the local government to make land use decisions under that plan."

Delta Properties v. Lane County, 271 Or App 612, 615-16, 352 P3d 86 (2015) (internal citations omitted). In other words, a local government's comprehensive

[2] Intervenors suggest that the prior Circuit Court decision on this issue found Petitioner had failed to adequately raise the issue. Int. Br. at 24 n. 2. The prior Circuit Court concluded that the use complied with the waivers but did not find that Petitioners had failed to raise the issue with specificity. Rec. 2390.

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plan goals implement and comply with statewide planning goals that are "mandatory and binding" on the local government. By not applying county goals, the Staff Report effectively waived state goals that were not identified in Intervenors' state waiver order.

Finally, Intervenor argues that substantial evidence supports a finding that the use complies with the waivers. Int. Br. at 26. Whether the use complies with the waiver requires a legal analysis of what the waiver allows. Intervenors do not point to evidence in the record addressing whether additional Goals must be waived to allow the use to continue.

CONCLUSION

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 Intervenors sought to vest as of December 6, 2007 was a 30-lot subdivision. When Respondent assessed the landowners' expenditures against the total cost of the 30-lot residential subdivision, it correctly found that Intervenors did not establish a vested right in the project. Rec. at 2080. Respondent erred in finding Intervenors established a vested right.

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DATED: September 14, 2016

Respectfully submitted,

s/ Courtney B. Johnson

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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 REPLY BRIEF 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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DATED this 14th day of September, 2016

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