FINAL YAMHILL COUNTY MEASURE 49 VESTING DECISION
INDEPENDENT VESTING OFFICER

DATE:	January 7, 2013
DOCKET:	VEST-01-2009
APPLICANT:	Youngman Family Trust
REQUEST:	To recognize a vested right to develop a subdivision of up to 12-lots, on a 58.14-acre property, pursuant to Section 5(3) of Measure 49; to allow completion and continuation of the development of the homesites under state and county waivers.
M37 ORDERS:	Yamhill County Board Order 06-119 (February 22, 2006) and State Final Order M121524 (June 5, 2006)
PLANNING DOCKET:	(none pending) (previous docket S-11-06)
CIRCUIT COURT REMAND ORDER:	Case No. CV 10-0295, February 7, 2012 Hon. Ronald W. Stone, Circuit Court Judge
TAX LOT:	R2526-1400 (file contains legal description)
LOCATION:	On the western boundary of 15345 NW Tupper Road, Yamhill, Oregon
ZONE DESIGNATION:	AF-40 (Agriculture/Forestry Large Holding)
REVIEW CRITERIA:	ORS 195.305 and Ordinance No. 823, and with consideration of the "common law" (see discussion in "Findings," below):
NOTICE:	Notice of the application was originally issued January 9, 2010. That notice period ended at 5 p.m. on February 1, 2010. Comments were received and additional materials were submitted prior to and during the 21-day notice period and are part of the county's file and record on review. On remand, notice was issued on October 5, 2012 and the comment period ended at 5:00 p.m. on October 29, 2012. Comments were received and additional exhibits and argument were submitted by Friends of Yamhill County,

DLCD and the applicant, and are also part of the county's file and record on review.

REVIEW AUTHORITY: Todd Sadlo, Vesting Officer (appointed under Ordinance No. 823).

DECISION: Approved.

FINDINGS:

A. Explanation of Legal Context.

- **A.1 General Legal Context**
- **A.2 Specific Legal Context: Yamhill County Circuit Court, LUBA, the Court of Appeals and Supreme Court**

B. Timeliness of Measure 37 Claims and Waivers.
C. Use Allowed Under Waivers Granted to the Applicant.
D. Whether the Applicant has a Common Law Vested Right as of December 6, 2007, to Complete and Continue the Use Described in the Waivers.

- **D.1 Legal Analysis Re: Vesting of Rights**
- **D.2 Oregon Vested Rights Common Law**
- **D.3 Clackamas County v. Holmes**
- **D.4 Oregon Cases Citing Holmes**
- **D.5 Youngman Vesting Overview**
- **D.6 Consideration of Ordinance No. 823 (Section 4) Factors**
- **D.7 Vesting Conclusion**

RECORD:

FINAL COUNTY VESTING DECISION:

IMPORTANT NOTICE ON TYPE OF DECISION AND JUDICIAL REVIEW OF DECISION:

FINDINGS:

A. Explanation of Legal Context.

NOTE: This Explanation of Legal Context and all other legal analysis contained in this decision is for use by the vesting officer in explaining his decision in this matter and is not intended as legal advice for any person. You should consult your own attorney for legal advice.

1. General Legal Context

This decision is issued on remand from the Circuit Court, and incorporates parts of the original county (review authority) decision with regard to the Youngman property. On February 7, 2012, Judge Ronald W. Stone issued an order reversing and remanding to the county, the county's decision in this case, and entered an Order:

> "* * * instructing the County to conduct any further proceedings to determine whether the Youngman Family Trust has established a common law vested right in the use described in the waiver orders consistent with Measure 49, the applicable common law, evidence from the existing record and any new evidence and/or argument submitted on remand on issues raised in the writ of review proceeding and impacted by the Supreme Court's clarification of the factors for determining when, in the context of Measure 49, common law rights to complete uses pursuant to Measure 37 waivers are vested."

The opponents and the applicant have submitted argument outlining and addressing "issues raised in the writ of review proceeding" and the review authority has examined how the evidence in the record and earlier county findings and conclusions are impacted by Friends of Yamhill County, Inc., v. Board of Commissioners of Yamhill County.[1], Ballot Measure 37 or "M37," was placed on the ballot by initiative, and adopted by Oregon voters on November 2, 2004. "Waivers" of land use laws and regulations were then issued under the provisions of M37, by the state and by local governments around the state, including Yamhill County.[2] Most waivers granted by the state and the county gave claimants the right to apply for a partition or subdivision of their property under state laws and county ordinances governing such developments.

In June of 2007, the Oregon Legislature referred Ballot Measure 49 (House Bill 3540 or "M49")[3] proposing to voters, substantial and complex amendments to Measure 37. M49 was adopted by voters on November 6, 2007, and its "effective" date was December 6, 2007.

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1 351 Or 219, 264 P3d 1265 (2011).

2 See Yamhill County Ordinance No. 749, as amended, implementing M37.

3 Portions of Measure 49 are codified at ORS 195.300-336. Section 5(3) of the measure is located in a note between ORS 195.300 and 195.308.

Section 5 of M49 concerns M37 claims that were "filed" before the date of adjournment of the 2007 Regular Legislative Session, which was June 15, 2007. It states, with regard to those "claimants," that they are:

> "entitled to just compensation as provided in: (1) Section 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;"

Sections 6 states that all M37 claimants who filed their claims on or before June 15, 2007 are "eligible for three home site approvals on the property" (if numerous other requirements are met). Section 7 makes such claimants "eligible for four to 10 home site approvals" on non-"high-value" resource land, that is not in a "groundwater restricted area," if additional proof is provided establishing that the "reduction in the fair market value of the property" caused by now-applicable land use restrictions is equal to or greater than the value of "home site approvals that may be established on the property" under the section, but no more than 10.

An M49 claimant who filed an M37 claim on or before June 15, 2007, is also entitled to "just compensation" in the form of being able to "complete and continue" the use described in a waiver issued by state or local governments before December 6, 2007. Section 5, (3) of M49 states:

> "A claimant that filed a claim under ORS 197.352 on or before [June 15, 2007] is entitled to just compensation as provided in:
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> * * *
>
> "(3) A waiver issued before [December 6, 2007] 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 [December 6, 2007] to complete and continue the use described in the waiver."

Section 5(3) of M49, therefore, allows completion and continuation of uses, to the full extent of state and county waivers issued prior to December 6, 2007, but only if "the claimant has a common law vested right" as of December 6, 2007 "to complete and continue the use described in the waiver."

County Ordinance No. 823 was adopted December 21, 2007 to establish a process for County review of vested right claims. Section 4.01 of Ordinance No. 823 states:

> "4.01 In determining whether the applicant has a vested right to continue and complete a use allowed under a Board Order granting Measure 37 relief, the Review Authority must consider the following factors based on the evidence submitted in the application:

(1) The amount of money spent on developing the use in relation to the total cost of establishing the use.

(2) The good faith of the property owner.

(3) Whether the property owner had notice of the proposed change in law before beginning development.

(4) Whether the improvements could be used for other uses that are allowed under the new law.

(5) The kind of use, location and cost of the development.

(6) Whether the owner's acts rise beyond mere contemplated use or preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

(7) Other relevant factors."

The factors listed in this section are consistent with the 1973 Oregon Supreme Court decision in Clackamas County v. Holmes, which is discussed below to provide context and support for the decision in this case.

To summarize, an applicant for a vesting determination must demonstrate to the County that:

1. The applicant filed Measure 37 claim(s) before June 15, 2007, and received state/local waivers before December 6, 2007;

2. The applicant's "use of the property complies with the waiver[s];" and

3. As of December 6, 2007, the applicant had established "a common law vested right" * * * "to complete and continue the use described in the waiver."

Under M49 and the county's M49 implementing ordinance, if on December 6, 2007, the applicant had a common law vested right to complete and continue the use described in state and county M37 waivers, the county is authorized to grant to the applicant, as "just compensation," the right to complete and continue such use. The decision in this case is not appealable to the Land Use Board of Appeals but is subject to review in Circuit Court under ORS 34.010 to 34.100.[4]

2. Specific Legal Context: Yamhill County Circuit Court, LUBA, the Oregon Court of Appeals and Supreme Court

[4] Ballot Measure 49, Section 16(1).

Several Yamhill County land use decisions concerning Measure 37 properties have been appealed to LUBA, and several vesting decisions (other than Cook and this case) have been appealed to the Yamhill County Circuit Court. On original review, the Circuit Court confirmed that each of the appellants had a vested right to continue uses outlined in M37 waivers.[5] The Circuit Court did not accept all of the vesting officer's legal theories regarding the text, context and intent of M49, or regarding land use doctrine on the finality of land use approvals. This decision does not attempt to present a full history of Yamhill County vesting decisions or appeals.

Several Yamhill County applicants for vesting determinations were also parties to LUBA (and Court of Appeals) claims by petitioners that the county erred in issuing land use approvals related to their M37 subdivisions.[6] The only LUBA case relevant to this discussion is Dunn v. Yamhill County,[7] which was filed against the county by Katherine and Martyn Dunn, and Friends of Yamhill County, Inc. Intervenors on the side of the County included Robert Janzen, Betty Janzen and Charles Lawrence Youngman, Trustee of the Youngman Family Trust.

In Dunn, LUBA stated:

> "In 2006, Robert and Betty Janzen and Maude Youngman filed a subdivision application with the county. The county planning commission approved the application, and petitioners appealed the approval to the board of county commissioners. While petitioners' appeal was pending before the board of commissioners, Maude Youngman passed away. The board of commissioners subsequently denied petitioners' appeal and approved the application."[8]

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[5] Five cases were consolidated for review in Circuit Court: Biggerstaff v. Board of Commissioners (BOC) & Ralph and Norma Johnson, CV08-0224; Damman & Friends of Yamhill County (FYC) v. BOC & Charles and Ellen McClure, CV08-0225; FYC v. BOC and Maralynn Abrams, CV08-0232; T.J. Kleikamp & FYC v. BOC & Glenn, Donald and Sharlene Gregg, CV08-0304; FYC v. BOC & Gordon Cook, CV08-0305. In those cases, the Circuit Court annulled part of the vesting officer decision, affirmed other parts, and affirmed the vesting officer's decision that "each property owner has a vested right to complete construction necessary to complete the residential use consistent with the Measure 37 waivers." *See also*, John and Elizabeth Kroo v. Yamhill County (BOC) and State of Oregon DLCD, CV08-0398; Samuel and Mildred Eastman v. Yamhill County, CV08-0516.

[6] See Reeves v. Yamhill County, 55 Or LUBA 452, 2007 WL 4662097 (2007) (Eastman); Welch v. Yamhill County, 228 Or App 124, 206 P3d 1213 (2009) (Kroo); Biggerstaff v. Yamhill County, 58 Or LUBA 476, 2009 WL 910247 (2009) (Johnson); Dunn v. Yamhill County, 55 Or LUBA 206, 2007 WL 327122 (2007). Several vesting decisions were also appealed to LUBA by Friends of Yamhill County and others, and then transferred to Circuit Court by LUBA (See Friends of Yamhill County v. Yamhill County, (McClure) 57 Or LUBA 1, 2008 WL 3249606 (2008), and subsequent Yamhill County cases transferred to Circuit Court pursuant to its reasoning.

[7] Dunn v. Yamhill County, 55 Or LUBA 206, 2007 WL 327122 (2007).

[8] Id. at 209.

LUBA reversed the county's decision to approve the subdivision preliminary plat, holding that Maude Youngman's death "rendered the previously granted [M37] waivers * * * void or ineffective, and that without those waivers, the county could not approve the preliminary subdivision application.[9] LUBA's decision asserted that LUBA "is not the appropriate body to determine, in the first instance, whether intervenors have a vested right to develop their proposed subdivision."[10]

The LUBA decision in Dunn was appealed to the Court of Appeals. An "Order Granting Petition for Reconsideration and Affirming Order of Dismissal" was provided by the applicant for this vesting decision, dated January 15, 2010. That order confirms that the determination of whether the applicant for a vesting decision in this case is entitled to continue and complete its 12-lot subdivision "must be asked and answered within the vesting proceeding now pending in Yamhill County * * *."[11]

As noted, on remand in this case, the Circuit Court instructed the county to consider "the Supreme Court's clarification of the factors for determining when, in the context of Measure 49, common law rights to complete uses pursuant to Measure 37 waivers are vested."

Friends of Yamhill County, Inc. v. Board of Commissioners of Yamhill County[12] concerned an application to the county for a vested rights determination filed by Gordon Cook. The county vesting officer approved the application. The Circuit Court affirmed part of the county's decision. The Court of Appeals reversed the trial court, and that decision was affirmed by the Supreme Court, on different grounds. Friends contains numerous instructions on remand, that have been addressed in this decision.

Under M49 and Yamhill County Ordinance No. 823, the County is the appropriate body to determine whether the applicant has a vested right to develop the proposed subdivision. For the reasons stated herein, the vesting officer has determined that, as of December 12, 2006, Maude Youngman, Trustee of the Youngman Family Trust, had a vested right to continue and complete development of the trust property, and to seek approval from the county for partitions or subdivision of the property into up to 12 homesites. As successor trustee, Charles Lawrence Youngman, and the Youngman Family Trust (the applicant herein) obtained or retained Maude Youngman's vested right.[13] To the extent possible, this decision is intended to be consistent with relevant

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9 Id. at 213-14.

10 Id. at 213.

11 Exhibit A to Tankersley letter dated February 16, 2010.

12 351 Or 219, 264 P3d 1265 (2011). The decision affirmed ("for different reasons") the decision of the Court of Appeals in Friends of Yamhill County v. Board of Commissioners, 237 Or App 149, 238 P3d 1016 (2010).

13 The vesting officer continues to reject Friends' argument that Smith v. State of Oregon, et al, Yamhill County Circuit Court No. CV060239, is relevant to this case. Unlike the facts in Smith, Maude Youngman and the Youngman Family Trust obtained both state and county Measure 37 waivers before her death, and also began construction of 12 homesites pursuant to the waivers, before her death.

Yamhill County Circuit Court and Oregon appellate court decisions, including Friends of Yamhill County, Inc. ("Friends").

B. Timeliness of Measure 37 Claims and Waivers.

Yamhill County Board Order 06-119 is an M37 "waiver" issued to the applicant on February 22, 2006, for the subject property. The Order is entitled: "In the Matter of an Order Allowing the Measure 37/Ordinance 749 Claim of Youngman Family Trust, Maude E. Youngman Trustee to Authorize Uses on the Subject Property Allowed When the Current Owner acquired the Property, Docket M37-115-05."

The State of Oregon, Departments of Administrative Services and of Land Conservation and Development Final Order in Claim No. M121524, is an M37 waiver issued to the applicant on June 5, 2006.[14] The dates of both of these orders are prior to the June 15, 2007 deadline for filing a vesting claim, as well as the effective date of M49, December 6, 2007. The applicant's state and county waivers were all applied for and obtained in a timely manner.

C. Use Allowed Under Waivers Granted to the Applicants.

The applicant's county waiver, Yamhill County Board Order 06-119, authorized the claimants:

> "to make application to divide the subject property into 12 lots and, upon the Planning Director's issuance of land division approval, to make applications to establish dwellings on undeveloped lots under land use regulations then in effect on May 1, 1962."
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> The State of Oregon's Final Order, Claim No. M121524 stated that:
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> "In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants' division of the 58.14-acre property into parcels and to their development of a dwelling on each parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33.
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> "The above referenced laws will not apply to Maude Youngman only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that use was permitted when she acquired an interest in the property on May 1, 1962."

[14] The State Order specified separate acquisition and waiver dates for four claimants, including Charles and Maude Youngman, in a manner that is not relevant to the decision in this case, which concerns Maude Youngman and the Youngman Family Trust. The vesting application was filed by the Youngman Family Trust, predicated principally on the M37 claim and vested rights of Maude Youngman.

Copies of numerous documents have been submitted into the record, by the applicant, neighbors, and Friends of Yamhill County. Those documents are considered on remand, along with new evidence and testimony submitted during a comment period that ended on October 29, 2012. The County's files in this matter, and documents and argument submitted within the comment period, are considered in this opinion to the extent necessary to render a decision.

Oregon law allows review of a county "land use decision" by the filing of an appeal to the Land Use Board of Appeals within 21 days of the date the decision was final.[15] Failure to file a timely notice of intent to appeal to the Land Use Board of Appeals (as well as failure to file a Petition for Review within the schedule established by LUBA) forecloses review of a final, County land use decision.[16] For a "process or proceeding" of the County resulting in other than a "land use decision," review is by writ of review, "and not otherwise."[17] The petition for a writ must be filed within 60 days of the County's "decision or determination."[18]

The state and county M37 waivers in this case allow the development of the site into 12 residential "lots" or "parcels."

In all but two cases reviewed by the vesting officer in Yamhill County, the applicants were found to have vested in a 'Holmes analysis,' as required by the county's ordinance and by state law, and as also having achieved 'vesting by final land use decision.'[19] In this case, the applicant has not obtained a final, un-appealed, discretionary land use approval from the County and therefore cannot demonstrate that it has achieved vesting by virtue of having obtained final, un-appealed subdivision approval prior to (or relating back to a date prior to) December 6, 2007.[20]

The "use" in this case is subdivision of the property and establishment of 12 homesites and/or homes. The waivers both allow that use. That conclusion is supported by a preponderance of the evidence and substantial evidence in the record as a whole, including, but not limited to, Board Order 07-141 (approving the 12-lot subdivision); LUBA's Final Opinion and Order in Dunn v. Yamhill County, (above); the waivers themselves; and especially by the evidence presented by the applicant and not effectively

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15 ORS 197.830.

16 ORS 197.830; OAR 661-010-0030(1).

17 ORS 34.020.

18 ORS 34.030 states, in relevant part, "A writ shall not be allowed unless the petition therefor is made within 60 days from the date of the decision or determination sought to be reviewed."

19 See decisions in VEST – 01, 02, 03, 12, 31 and 34 – 2008.

20 The vesting officer's opinions regarding the nature of final land use decisions, land use entitlements and the intent of M49 were rejected by the Yamhill County Circuit Court in five consolidated cases. (CV08-0224; CV08-0225; CV08-232; CV08-0304; CV08-0305). The Court of Appeals discussed issue preclusion, but otherwise did not directly address those issues. *See* Friends, 237 Or App 149, 170. No cross-appeal was filed in Cook, and the vesting officer's argument and conclusions were not considered on review by the Supreme Court in Friends. 351 Or 219, 250.

rebutted by the opponents. The proposed 12-lot subdivision is consistent with the county and state waivers issued in this case.

In Friends, the Supreme Court determined that:

> "* * * the county applied the wrong legal standards in deciding the historical facts that informed its vested rights determination, and we accordingly leave for another day the appropriated standard of review for vested rights determinations."[21]

According to the Court, a writ of review "permits a plaintiff to challenge a county's vested rights decision either because the county 'made a finding or order not supported by substantial evidence in the whole record' or because it '[i]mproperly construed the applicable law."[22] The question is then more properly stated as whether: "the county improperly construed the law in determining that Cook had a vested right to complete his subdivision * * *."[23] With regard to at least one aspect of the decision (the ratio test) the Court concluded that:

> "Substantial evidence, however, is the standard by which a court reviews a county's factual findings on a writ of review * * *. It is not the standard by which the trier of fact makes a factual finding in the first place. The county's job as the trier of fact was to decide by a preponderance of the evidence what the estimated cost of constructing the planned homes was. The county did not do that."[24]

With regard to whether the "proposed use complies with the terms of the Measure 37 waivers," The Supreme Court required a closer look than the analysis provided by the county in Friends, and in this case. Specifically, and presumably as a matter of law, the county is required by Friends to determine whether the zoning and subdivision ordinances applicable when Maude Youngman acquired the property would have permitted a residential subdivision.

The original record of this proceeding establishes that Maude Youngman received the state and county waivers in question. All of the expenditures incurred toward vesting in this case were made prior to her death. She purchased the property on May 1, 1962, prior to the imposition of restrictive state laws, statewide Land Use Planning Goals, and county ordinances. The state's Final Staff Report and Recommendation recites the history of the property ownership, and the dates on which additional owners took possession, and the involvement of the Youngman Family Trust. The Report states: "Claimant and family member Maude Youngman acquired the subject property on May 1, 1962, prior to the adoption of statewide planning goals and their implementing statutes

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21 351 Or 219, 243, FN 17.

22 *Id.* at 244, citation and footnote omitted.

23 *Id.*

24 *Id*. at 246-47

and regulations."[25] The county, in its order, stated that the county adopted subdivision regulations in 1959, but that no zoning, lot size, or other restrictions were applied to the property until (at the earliest) September, 1974, when the county adopted a comprehensive land use plan. The county identifies February 11, 1976 as the date when resource zoning was first applied to the site: AF-20.[26] (Exhibit 4 of original application, page 5)

As a legal conclusion, subdivision of the 58-acre property into 12 lots was not restricted by state law or rule or county ordinance in 1962, and was therefore, "affirmatively permitted" if done in conformance with largely non-discretionary subdivision standards.[27] As a factual conclusion, a preponderance of evidence in the record supports the conclusion that Maude Youngman purchased the subject property in 1962, and owned the property until her death in December, 2006, as Trustee of the Youngman Family Trust.[28] The applicant has met its burden of establishing that residential subdivision uses of the type outlined in the waivers were allowed on the property when Maude Youngman took possession, in 1962.

D. Whether the Applicant has a Common Law Vested Right as of December 6, 2007, to Complete and Continue the Use Described in the Waivers.

D.1 Legal Analysis Re: Vesting of Rights[29]

A "vested right" is an incomplete nonconforming use. "A nonconforming use refers to one that was lawful before a zoning ordinance was enacted and that, as a result, may be maintained afterwards, even though it does not comply with the ordinance."[30]

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[25] Exhibit 2, p. 10 of the application on remand.

[26] Exhibit 4, p. 5 of the application on remand.

[27] 351 Or 219, 252.

[28] On remand, Friends reargues its original claim that a holding in a Yamhill County Circuit Court case supports its position on the transferability of Measure 37 rights. This issue was addressed in the original county decision in this case, (Page 7, FN 12) and there is no basis for a different conclusion on remand. (*See* FN 13, above).

[29] This background information was included in the original decision and is provided here for legal context.

[30] City of Mosier v. Hood River Sand, Gravel and Ready-Mix, Inc., 206 Or App 292, 136 P.3d 1160, (2006) *citing* Polk County v. Martin, 292 Or. 69, 74, 636 P.2d 952 (1981). *See also,* Fountain Village Development Co. v. Multnomah County, 176 Or App 213, 221-222, 31 P2d 458 (2001): "We reject petitioner's proposed mutually exclusive dichotomization of 'vested rights' and 'nonconforming uses.' Nothing in Oregon's case law or statutes precludes subjecting vested rights to develop property to the same limitations that apply to nonconforming uses generally-and, indeed, as addressed below, not to do so would yield incongruous results. Moreover, under ORS 215.050(1), (FN9) counties are responsible for adopting comprehensive plans, as well as zoning, subdivision, and other ordinances applicable to all land within the county. Just as the regulation of existing nonconforming uses is a matter within a county's authorized land use purview, so too is the regulation of vested rights to develop-which are, in effect, inchoate nonconforming uses. The fact that ORS 215.130 does not explicitly use the term "vested rights" does not mean that local governments responsible for ordinances controlling land use are

Use of the property as a subdivision of 12 homesites in this case was legal in 2006 (under state and county waivers), and if "complete" before December 6, 2007, became nonconforming on that date due to voter adoption of M49. If the use was not complete, a vested right determination can secure in the applicant the right to continue and complete its use as if the use were a completed nonconforming use before M49 took effect.

The vested rights doctrine derives from basic ideas of fairness. The right is recognized by common law, is sometimes conferred or limited by statute, and is often considered to be based in equitable principles or to have a basis in state and federal constitutional due process and "takings" law.[31]

Oregon currently has at least four statutes that can be viewed as "vesting" or "nonconforming use" statutes. First (and second), parallel statutes ORS 215.427(3) and 227.178(3) require that counties and cities base a decision on an application for a permit, limited land use decision or zone change "upon the standards and criteria that were applicable at the time the application was first submitted," without regard to subsequently adopted laws. This kind of vesting does not confer a *right to develop*, but a right to be judged under identified, existing laws.

Oregon's third "vesting" statue is ORS 215.130(5), which regulates how *counties* deal with existing, developed uses that were legal when developed, but have become "nonconforming" due to subsequent changes in zoning laws or development regulations, including setbacks and design standards.[32] In simple terms, the right to continue a developed, nonconforming use has vested in the owner of the property and runs with the land.[33]

Oregon's fourth "vesting" statute is M49 itself, which allows completion of certain developments that were begun legally under M37, but had not been completed as of the effective date of the act, December 6, 2007.

Additionally, under Oregon's system of land use, a final, unappealed land use decision vests, in the applicant for such a decision, an entitlement: the right to seek and obtain all non-discretionary permits and approvals to complete the use specified in the

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powerless to address and regulate the conditions under which vested rights may be extinguished." The power to extinguish is the power to allow continuance.

[31] In Kleikamp v. Board of County Commissioners, 240 Or App 57, 59-60, 246 P3d 56, 58 (2010), the Court of Appeals stated that the remedy is "equitable in nature." The Blacks Law Dictionary (1951) definition of "vested rights" is useful in discussing the different possible bases for the concept, beginning with "constitutional law," progressing through equity; due process; prohibitions on "retrospective laws;" and ending with: "A right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy." at 1735

[32] There is no parallel statute governing nonconforming use determinations by cities.

[33] ORS 215.130(5) states, in relevant part: "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. * * *"

approval. Such approvals are "final land use decisions" that are generally not subject to collateral attack in any Oregon forum.[34]

D.2 Oregon Vested Rights Common Law

Other than the four above-referenced statutes, and the vesting of final land use approval rights through Oregon's statewide land use review system, "vested rights" in Oregon are governed by common law doctrine. Clackamas County v. Holmes[35] established the current Oregon test for determining the existence of a vested right to complete an incomplete nonconforming use, and that test has been incorporated into Section 4 of Ordinance No. 823. Although the existence of the right is clear, whether the right is conferred as a principle of equity or on some other basis or combination of bases, has not been fully resolved by Oregon appellate courts.[36] There is also a question, untested by Oregon courts, regarding the extent to which a vested right is protected by the "takings" clauses of the Oregon and US Constitutions.[37] It would seem that if a right to develop has vested in a property owner and runs with the land, that right cannot be taken away without just compensation. In that way, newly enacted restrictions on development of a previously vested right to develop might be characterized as exactions, to potentially be judged under current tests requiring an "essential nexus" and "rough proportionality."[38] As relevant to this case, Measures 37 provided, and Measure 49 provides, extra-constitutional (or "subconstitutional") "just compensation" rights to certain persons who purchased their properties prior to the enactment of modern zoning and planning restrictions.

D.3 Clackamas County v. Holmes

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[34] Forman v. Clatsop County, 297 Or 129, 681 P.2d 786 (1984); Beck v. City of Tillamook, 105 Or App 276, 278, 5 P.2d 144 (1991) *aff'd in part, rev'd in part*, 313 Or 148, 831 P2d 678 (1992) (issues conclusively resolved are not reviewable a second time by LUBA or appellate courts).

[35] Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973).

[36] *See* Fountain Village Development Company v. Multnomah County 39 Or LUBA 2007 (2001) in which LUBA suggested that Oregon vested rights are not limited to equitable principles. 2000 WL 33405959 at 8. On appeal, the Court of Appeals avoided the issue, 176 Or App 213, 31 P3d 458 (2001), and the Supreme Court denied review 334 Or 411, 52 P3d 436 (2002). In Friends, the Supreme Court stated: "This court has used the phrase 'vested right' in the context of land use regulation to describe a subconstitutional conclusion that a landowner is entitled either to continue a preexisting use or to complete a partially finished one." 351 Or 219, 235 (emphasis added, citations omitted). Note however, that M37 and 49 both equate enumerated vested development rights with "just compensation."

[37] Article I, §18 of the Oregon Constitution states, in relevant part: "Private property shall not be taken for public use * * * without just compensation * * *." The Fifth Amendment to the US constitution states, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[38] *See*, Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); Schultz v. City of Grants Pass, 131 Or App 220, 884 P2d 569, (1994); J.C. Reeves Corp. v. Clackamas County, 131 Or.App. 615, 617, 887 P2d 360 (1994); Clark v. City of Albany, 137 Or. App. 293, 904 P2d 185, (1996), *rev. den*. 322 Or. 644, 912 P2d 375 (1996); Art Piculell Group v. Clackamas County, 142 Or. App. 327, 340, 922 P2d 1227 (1996) (discussed below).

The defendants in Clackamas County v. Holmes had been in the chicken processing business since approximately 1950, with a plant near Milwaukie. Due to physical limitations and rezoning, they needed to move to a new location and in 1963 found an alternative site. They hired a lawyer who investigated the zoning of the new property and was advised by the county that the land was un-zoned and there was "no long-range planning in that area." Before purchasing the property in 1965, they conducted soil tests and received preliminary approval for a septic system from a state agency.[39]

After purchasing the property, the defendants drilled a well with sufficient flow for a chicken processing plant and made special arrangements for electrical power and transformers, all in excess of what would be necessary for farm or residential use. They hired an agronomist to investigate the soils and determine the best grass to plant to allow wastewater applied through an irrigation system to percolate and not pond.

Defendant's development costs by March 1966 totaled $33,000, out of an approximate total estimated cost to complete the project of $400,000 - $500,000 (approximately 6% - 8%). At that time, the county adopted an interim Rural Agricultural-Single Family zone for the property, foreclosing its use for a chicken processing plant. Defendants applied for a zone change in 1966 that was denied in 1967, pastured cattle on the property, and in 1970 began construction of the processing plant without building permits. The county obtained an injunction from Circuit Court, and the Court of Appeals affirmed the Circuit Court's issuance of an injunction.[40] In doing so, the Court of Appeals cited treatises by Anderson and Rathkopf for the proposition that:

> "There is an exception to the 'actual use' requirement [for establishing a nonconforming use] in situations where a property owner has incurred substantial and legally sufficient expense in reliance upon a previously issued building permit. (citations omitted) In such cases there exists a 'vested right' to the nonconforming use, even though the use was not in existence at the time the zoning restriction became effective."[41]

The Court of Appeals held that expenditures could not support a finding of a vested right unless they occurred prior to the adverse zoning and were "exclusively related to the proposed use."[42] The Court cited a New York case in which a road to a shopping center was "easily adaptable to uses permitted under an amendment to the zoning ordinance which outlaws shopping centers."[43] The Court of Appeals then concluded that all of the defendants' expenses, with the exception of the expenditure of $2,497.85 for building plans and possibly the cost of a phone line to Portland, were "as consistent with agricultural use as they were with the proposed chicken processing plant," were therefore not "exclusively related to" the proposed chicken plant, and could not therefore be counted as expenses incurred in reliance on laws in effect at they time they were made.

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39 *Id.* at 196.

40 Clackamas County v. Holmes, 11 Or. App. 1, 501 P.2d 333 (1972).

41 *Id*. at 9-10.

42 *Id*. at 10.

43 Town of Hempstead v. Lynne, 32 Misc.2d 312, 22 N.Y.S.2d 526 (1961).

These expenses were deemed by the Court to be insubstantial when compared to the $400-500,000 estimated cost of completing the processing plant.[44]

The Oregon Supreme Court reversed. Citing Anderson, American Law of Zoning and other secondary sources, the court stated:

> "A nonconforming use is one which lawfully existed prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area. (citation omitted) The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted. (quote omitted) The question of whether the landowner has proceeded far enough with the proposed construction to have acquired a vested right is an issue of fact to be decided on a case-by-case basis. (citation omitted) The courts and the text writers are agreed that in order for a landowner to have acquired a vested right to proceed with the construction, the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred. (citations omitted)"[45]

After citing the same New York shopping center case as the Court of Appeals, the Supreme Court stated:

> "The test of whether a landowner has developed his land to 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 ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e. whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects."[46]

Considering these factors, the Supreme Court concluded that: "the improvements were [not] as consistent with agricultural use as they were with use as a chicken processing plant," and the entire $33,000 in expenditures should be considered as being related to completion of the project.[47] The Court also rejected the county's arguments: that no vested right could attach because no building permit was issued; and that the

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44 *Id*. at 11.
45 265 Or 193, 197.
46 *Id*. at 199.
47 *Id*. at 200.

defendants had abandoned their projected use through delay, by applying for a zone change, and by pasturing cattle on the land.[48] The Court concluded that:

> "[t]he defendants acted in good faith, the expenses incurred were substantial and directly related to the construction and operation of the processing plant, and therefore defendants acquired a vested right to complete the construction."[49]

D.4 Oregon Cases Citing Holmes

As an example of cases applying Holmes, in Milcrest Corp. v. Clackamas County,[50] the planning commission approved the developer's application for a PUD on a 440-acre site in January, 1969. The initial project included approximately 1000 living units, a dam, a lake, a nine-hole golf course, commercial and support facilities. In October, 1969, the county approved preliminary plats for the two subdivisions comprising the PUD. The developer satisfied the conditions and filed a final plat for one of the subdivisions in December, 1969.

During 1969 and 1970, the developer decided to expand the original PUD and acquired an option on an additional 220 acres of land adjoining the original 440-acre site. In August, 1970, the developer submitted a revised PUD application for the entire 660-acre tract. The revised project was substantially similar to the original but increased the number of dwelling units to 1,573. The county approved the application and the preliminary plat for the additional 220-acre area.

In late 1971 or early 1972, the developer encountered problems obtaining permits and financial difficulties, and lost title to the 220-acre expansion. In 1974 the county adopted a comprehensive plan, and in February, 1979, the defendant Boundary Commission denied necessary approval for the formation of a service district to provide sewer service to the entire development. By this time, the developer had substantially completed construction of the dam and the lake bed; filled the lake; completed other design and developmental site work; had made expenditures for design, engineering and construction that exceeded $600,000; and had made a total investment in the project exceeding one million dollars.

The trial court decreed that plaintiff had a vested right to develop the entire 660 acres of land described "in accordance with the approved site development plan and revised site development plan, and that said vested right shall run with the land." The Court of Appeals reversed the trial court as to the 220 acres, but affirmed as to the 440 acres. In doing so, the court stated:

> "We agree with the trial court that plaintiff substantially commenced the project, made substantial expenditures, acted in good faith and cannot use the development that has taken place for conforming alternative uses from

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48 *Id*. at 201.

49 *Id*.

50 Milcrest Corp. v. Clackamas County, 59 Or App 177, 650 P2d 963 (1982).

> which plaintiff can obtain a reasonable economic return. We therefore agree that plaintiff has acquired a vested right in a nonconforming use.[51]

However, the court noted 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. Correspondingly, there was no substantial commencement of construction on the 220-acre addition. Alternative uses of the 220 acres, consistent with the county's comprehensive plan, remain available; indeed, there has been no cognizable development of the 220 acres that is consistent with the *nonconforming* use. Finally, plaintiff can claim no entitlement to a reasonable return on its investment in property in which it has no remaining interest."[52]

The plaintiffs in Milcrest did not even own the 220-acre parcel for which the Court denied vested right status. The 220-acres was an expansion of the original proposal, not an integral part of it, and was obtained after most of the "vesting" expenditures had already been made. Those expenditures allowed the Court to establish vested right status for the original 440-acre proposal with a single sentence citing Holmes. The same expenditures could not be applied to the 220-acre parcel because they pre-dated its acquisition.[53]

Mason v. Mountain River Estates[54] concerned a county that had a three-stage approval process for PUDs, and a developer who had obtained Stage 2 approval for his PUD and subdivision. To protect the approval from anticipated Goal 3 (agriculture) and Goal 4 (forestry) challenges, the county adopted findings attempting to establish an "exception" to those goals under state law. The exceptions were later rejected by LCDC. Meanwhile, the developer had begun grading roads and incurring substantial expenses for planning, applications and government approvals.

These already bad facts (for the developer) were compounded by clear language in the ordinance stating that no construction could take place until Stage 3 approval was obtained. The developer had "jumped the gun" in making expenditures, which could then not be counted toward establishment of a vested right.[55]

Finally, the case of Eklund v. Clackamas County[56] bears noting, because it restates the Holmes vested rights test. In Eklund, in determining that a developer had a vested right to complete a subdivision, the Court stated:

> "The Supreme Court in Holmes identified four essential factors to be considered in assessing the evidence of a nonconforming use; (1) the ratio

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51 *Id*. at 181 (citing Holmes).

52 *Id*. at 182.

53 *Id*.

54 Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529 (1985).

55 *Id*. at 339.

56 Eklund v. Clackamas County, 36 Or. App. 73, 583 P.2d 567, 571 (1978).

> of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost. None of these factors is predominant; they are merely guidelines in assessing the evidence and deciding the issue."[57]

For reasons identified in this decision, a preponderance of evidence in the record regarding the development establishes that prior to her death on December 12, 2006, Maude Youngman and the Youngman Family Trust had met the "common law" vesting factors/guidelines established in Holmes, in this restatement from Eklund, in Section 4 of Ordinance No. 823, and in Friends of Yamhill County, Inc. v. Bd. of Comm. of Yamhill County.

D.5 Youngman Vesting Overview

The preliminary plat for the applicant's subdivision was approved by the County on January 31, 2007, but was appealed, and the decision was reversed by LUBA on October 11, 2007, due to the death of Maude Youngman. The applicant for this vesting decision argues that the right to continue and complete the subdivision, under the M37 waivers, had vested in Maude Youngman prior to her death, transferred to the Youngman Family Trust upon her death, and thereby survived the adoption of M49. In its decision in Kroo, the Circuit Court noted that: "one landowner ought not obtain a vested right to complete the development and the other obtain it merely because an opponent chose to file an appeal in one case and not the other."[58]

By December 12, 2006, Maude Youngman had taken substantial steps toward development of the property in conformance with the M37 waivers, including monetary expenditures and "in-kind" activities, and including development steps that rose "beyond mere contemplated use or preparation." All of the activities and expenditures were legal at the time and in good faith. In this case, it was reasonable for Maude Youngman to take reasonable steps to secure her rights under the M37 waivers.

The applicant and/or its trustee or predecessor in interest obtained state and county waivers, and made substantial and reasonable expenditures to develop the property and to obtain all required discretionary land use approvals. These activities took place before Maude Youngman's death.

When interpreting a statutory enactment, the text and context are the first level of analysis. "Common law" is generally understood to be a reference to 'judge made' law, as opposed to "statutory law." Common definitions of "common law" make reference to "custom" and "usage" by the courts.[59] "Vested" is usually associated with a legally

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[57] *Id*. at 81.

[58] Order in CV08-0398 at 5. (emphasis added for clarity)

[59] Webster's Third New International Dictionary, (unabridged ed. 1993) p. 459 defines "common law" as **"2** in U.S. state courts and statutes : the common law as it existed in England

protected entitlement.[60] A "common law vested right" would be fairly defined as a legally protected entitlement that has been developed by the courts, as opposed to the legislature. This view is confirmed in Friends: "common law" is a reference to Oregon common law.[61]

As noted, Clackamas County v. Holmes is the seminal case in Oregon outlining a common law vested right. The Supreme Court in Friends agreed that the drafters of M49 were referring to the Holmes line of cases in using the phrase "common law vested right."[62] Yamhill County has listed the Holmes factors as necessary to address in establishing a vested right, and those factors are useful in framing the larger issue, which is the proper interpretation of M49. Holmes involved expenditures by the property owners for uses for which they had obtained no governmental approvals. In this case, all of the claimed expenditures were made in reliance on state and county waivers. All of the actions taken by the applicants were (or appear to have been) legal at the time they were taken. On its face, the county's approval contemplated the transfer of each lot or home to third parties and the eventual construction or development of 12 homes.

D.6 Consideration of Ordinance No. 823 (Section 4) Factors

Section 4 of Ordinance No. 823 requires consideration of six "factors" and a catch-all category of "other relevant factors," that were all first listed or otherwise discussed in Clackamas County v. Holmes.[63] In this case, both the applicant and the opponents have submitted information and argument addressing the Ordinance No. 823 (Section 4) factors.

The following findings address the Holmes (and Ordinance 823) factors/guidelines to explain why, in this case, the applicant's right to complete its subdivision has vested. In reviewing these factors, it is important to consider the explanation in Holmes, quoted above:

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at the time of the American Revolution or at some other time fixed by state statute with whatever modifications may have been made by the inclusion at that time of doctrines from other systems of law (as equity or civil law) together with such important English statutes of general application as were suitable to the needs and conditions of the state provided no such statute contravened any local statute **3 :** unwritten law as opposed to statute law *** * * 6 :** the English common law as extended or modified by any doctrines taken from another system of law (as equity or civil law) or even by statutes whenever those doctrines or statutes may be judicially asserted to grant the remedies recognized under the English common law.

[60] Webster's Third New International Dictionary, (unabridged ed. 1993) p. 2547 defines "vested right" as "a right belonging so absolutely, completely, and unconditionally to a person that it cannot be defeated by the act of any private person and that is entitled to governmental protection usu. under a constitutional guarantee." (and see Blacks Law Dictionary definition, quoted above.)

[61] Friends, 351 Or 219, 235.

[62] In accord: Corey v. Department of Land Conservation and Development, 344 Or 457, 184 P3d 1109 (2008).

[63] Clackamas County v. Holmes, 265 Or 193 (1973). Note that in Eklund v. Clackamas County, (cited *supra*) the Court indicated that the Holmes factors are "merely guidelines."

> "The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development [when the law changes].
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> * * *
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> "The question of whether the landowner has proceeded far enough * * * is an issue of fact to be decided on a case-by-case basis.
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> * * *
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> [And] "the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred." [64]

Factor (1): The amount of money spent on developing the use in relation to the total cost of establishing the use.

In Friends, factor (1) received significant attention from the Court of Appeals and Supreme Court.[65] The Court of Appeals elevated the importance of the ratio test. The Supreme Court rejected that approach, noting that in Holmes, the Court specifically rejected a New York decision (discussed above), stating:

> "The New York court had 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 'exclusive[ly]' to the proposed development should be considered in determining the ratio."[66]

To the contrary, the Court in Friends explained that Holmes departed from the New York rule in three respects, summarized as follows:

1. "[The Holmes Court] did not focus solely on the expenditure ratio."
2. Expenditures need not be "made 'for the exclusive purpose' of the proposed development," but instead, the question is "whether 'the expenditures have any relation to the completed project or could apply to various other uses of the land.'"
3. And third:

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64 265 Or 193, 197.

65 *See also*, Biggerstaff v. Board of County Commissioners, 240 Or App 46, 245 P3d 688 (2010); and Kleikamp v. Board of County Commissioners, 240 Or App 57, 246 P3d 56 (2010), (both issued prior to Friends and discussing the expenditure ratio) and DLCD v. Linn County, 249 Or App 537, 278 P3d 83 (2012), issued after Friends, and also remanding due to county errors in calculating the expenditure ratio.

66 351 Or 219, 236.

> "[The] New York decision deducted the expenses that were not incurred exclusively for the proposed development from the numerator of the ratio, making the entire vesting decision turn on the resulting ratio. Holmes, by contrast, described the issue as whether the expenditures 'have any relation to the completed project or could apply to various other uses of the land' as one of five factors that 'should be taken into consideration' in addition to the expenditure ratio."[67]

With regard to the importance of the expenditure ratio, the Court in Friends stated:

> "We also conclude that the Court of Appeals erred in discounting some of the Holmes factors and finding as a result, that other factors were 'more material.' Having reached those conclusions, we note that all of the Holmes factors may not apply in a given case and that the extent to which they do apply will presumably vary with the circumstances of each case. We also note that, when a landowner seeks to establish a vested right because 'substantial costs toward completion of the job * * * have been incurred,' only one of the Holmes factors entails consideration of the 'costs * * * incurred' –namely, 'the ratio of expenses incurred to the total cost of the project.' (citation omitted) That factor provides an objective measure of how far the landowner has proceeded towards completion of the construction. As such, we think it provides the necessary starting point in analyzing whether a landowner has incurred substantial costs toward completion of the job, although the other Holmes factors will bear on whether the costs incurred are substantial enough to establish a vested right under section 5(3)."[68]

The parties dispute the estimated total cost of developing the subdivision and the amount of 'good faith' expenditures. In the original decision in this matter, the vesting officer found that the applicants established that, prior to December 12, 2006, $102,313 had been spent by the applicant toward the completion of the use described in the M37 waivers. Evidence and argument received on remand to dispute that amount and what it includes, is not persuasive.

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[67] *Id*. at 237, emphasis in original. The Supreme Court in Friends also noted that 40 years have passed since Holmes; that "the amount of upfront costs that landowners must incur to build some projects has increased; that "landowners may have to invest substantial sums before beginning construction" and that: "We cannot lose sight of those changes in applying the factors indentified in Holmes to current conditions." *Id.* at 237-238. The Court may have been referring to the high cost of consultants and lawyers, to obtain land use permits under "current conditions." M37 dramatically increased those cost for some individuals. *See e.g.* State ex rel. English v. Multnomah County, 231 Or App 286, 219 P3d 594 (2009) upholding the award of nearly $200,000 in legal fees to the estate of Dorothy English, for her efforts to obtain land use approvals under M37, and State ex rel. English v. Multnomah County, 348 Or 417, 238 P3d 980 (2010) upholding the award of $1,150,000 in damages to her estate.

[68] *Id.* at 242-43.

The vesting officer also agrees with calculations made by the applicant of the possible total expense of creating homesites with homes, to the extent placing homes on the developed subdivision lots is necessary to vest rights to continue the use that 'run with the land' as vested nonconforming uses. As noted in earlier county vesting decisions, there are many highly subjective methods for making these calculations. In its original application and as supplemented on remand, the applicant presents sufficient evidence to conclude that the denominator of the vesting ratio is in the range of $1,127,059 to $1,664,379. These figures are supported by evidence in the record and are not hypothetical. The scenarios presented by DLCD and Friends are largely hypothetical and based on an unsupported assumption that the applicant planned to build luxury homes on the site. The applicant's evidence supports a ratio of 9.08% to 6.15%, which is consistent with ratios of costs incurred to total costs for the project deemed "substantial" in Holmes.

The vesting officer agrees with the applicant that all of the expenses described by the applicant as properly being in the numerator of the ratio are reasonable and should be counted under the Holmes analysis in this case. Prior to her death, Maude Youngman and the Youngman Family Trust made substantial expenditures toward completion of the use, whether vesting is measured as a ratio of expenses prior to December 12, 2006 to *either* the expense of complete homesite development, *or* completion of a habitable dwelling on every single lot. The Holmes cases contain a wide range of ratios for successful and unsuccessful vesting, because the ratio is only one factor in the overall Holmes fairness equation (establishing the substantiality of the expenses incurred), and because the other factors are capable of tipping the scale in favor of or against a petitioner.

The record supports a conclusion that the applicant originally intended (planned) to develop lots for sale to third parties to develop with houses. It is clear from the repeated reference to "homesites" in the application and approvals; in the calculations of "just compensation" provided by the applicant; and in the affidavits submitted by the applicant, that the applicant was planning to record a subdivision plat and market residential lots. The confusion of M37 resulted in a wealth of opinions regarding its meaning. Those who benefitted from its passage by being eligible for just compensation or waivers, were understandably interested in completing the M37 process and obtaining all entitlements necessary to develop their eligible properties. Given applicable statutory and county subdivision laws, the applicant's actions were objectively reasonable—the applicant obtained valid waivers and made objectively reasonable expenditures to develop the subdivision that the waivers appear to allow.

The county's decision in Friends (Gordon Cook vesting decision) discussed the range of potential "denominators," but failed to choose one, concluding that the exercise was speculative, and that other factors tipped the scale in favor of a vesting determination. Both the Court of Appeals and the Supreme Court agreed that the county

did not properly define the projected cost of the development.[69] The Supreme Court stated:

> "We agree with the Court of Appeals that the county misapplied the governing law in failing to decide the ratio between the costs that Cook had incurred and the projected cost of constructing the residential subdivision."[70]

The "cost of constructing the residential subdivision" could refer to the cost of finalizing the plat and installing roads, utilities, and other residential amenities. The Court made clear that the denominator must also include the cost of building homes:

> "The county found the costs that Cook had incurred as of the effective date of Measure 49. The county erred, however, when it failed to find the estimated cost of building the homes."[71]

The Court's emphasis in Friends was on what Cook planned to build. The Court stated:

> "The county did not determine the type of homes that Cook planned to build, nor did it determine what the cost of building those homes was."[72]

Footnote 20, immediately following the quoted language, states:

> "In deciding the cost of building the homes, the county must find what type of homes Cook planned to build. To the extent that Cook's plans changed between the time that he began planning the development and the effective date of Measure 49, then the county must decide whether the change in plans was a bad-faith attempt to thwart Measure 49 or a good-faith response to shifting economic or other conditions."[73]

The issue of good or bad faith actions by the applicant is discussed in more detail below. In Friends, the applicant made expenditures to vest the use up to the effective date of M49.[74] In this case, the expenditures identified by the applicant all occurred prior to December 12, 2006. M49 was not referred to the voters until June of 2007. The expenditures in this case were all for the purpose of finalizing and recording a subdivision plat and taking steps to begin development of a 12-lot subdivision on the property. Competent legal advice that the record establishes the applicant sought and followed, recommended that the applicant establish the actual cost of developing the site with manufactured homes and with non-prefabricated homes built on the premises.

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69 *Id.* at 234.
70 *Id.* at 245.
71 *Id*. at 246.
72 *Id.*
73 *Id.*
74 *Id.* at 228.

As for "attempt[ing] to thwart Measure 49": No evidence was provided by Friends or by DLCD in this case to support a conclusion that the applicants "attempt[ed] to thwart" M49 by proposing to sell vacant lots; by proposing to establish manufactured homes; or by proposing to construct homes on each lot, prior to the effective date of M49. Based on the record, there is no reason to conclude that the applicant was not acting in good faith. The preponderance of evidence in the record, including information submitted with the original application as supplemented by the applicant, establishes that the applicant's development plans and proposals were all formulated and presented to the county in good faith.

In reviewing Gordon Cook's vesting application (Friends), the county concluded that un-appealed final plat recordation prior to the adoption of M49 entitled the owner of the property to sell the lots, and that M49 did not extinguish those entitlements. That determination was overturned by the Circuit Court, not directly addressed by the Court of Appeals, was not cross-appealed, and the issue was not considered by the Supreme Court.[75] In this case, neither of the waivers were appealed, but the approval of the preliminary plat was appealed, and those appeals prevented finalization of the proposed subdivision prior to adoption of M49. While not addressing these issues, Friends clearly requires that the county determine the types of homes that the applicant planned to build prior to the effective date of Measure 49.

The preponderance of evidence in this case is to the effect that the applicant intended to sell vacant lots, and justified its application for a vesting determination by providing good faith estimates of the cost of developing each lot with manufactured housing and of constructing a dwelling on each lot. Opponents arguments that the correct ratio has a denominator consistent with the development of luxury homes includes unrecorded CC&Rs (not adopted in this case, not required by law, and subject to modification) and other evidence that is unpersuasive (e.g. reference to "natural elegance" and rebutted septic system size claims).

Given the evidence of what the applicant planned in this case, it is reasonable to assume that such a requirement of law could be satisfied by establishing the cost of placement of a manufactured home or construction of a low-end frame home on each lot. The applicant "planned" to install manufactured homes, as the minimum home that the applicant believed necessary to vest the right to sell the lots. This is not a sign of bad faith, but a good faith effort to obtain the benefit of rights previously granted to the applicant by M37. Arguments by Friend and DLCD to the contrary are not persuasive.[76]

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[75] *See* 351 Or 219 at 231; 232; 233 FN 9; 245 FN 19 and 250.

[76] DLCD cites a reference in a set of notes to proposed (but not recorded) CC&Rs, and a page in a document submitted by the applicant entitled "Pike Woods Estate, Natural Elegance" as (it's only) evidence that a high-end subdivision was envisioned by the applicant. The hearings official accepts the applicant's argument here that it intended to secure the right to sell subdivision lots, and to do whatever was legally required to secure the right to do so. Nothing presented by Friends or DLCD establishes the validity of the approach they propose to establishment of the denominator of the ratio.

The category of reasonable expenditures in this case includes expenditures to obtain land use approvals, "surveying, clearing, well drilling, engineering roads, installing septic systems * * * and proving feasibility of the proposed use," roughing in and placing gravel on subdivision streets, and otherwise as detailed by the applicant. The vesting officer accepts the applicant's figures regarding the costs incurred. All of the expenditures were made to pursue permits available at the time.

The issue of whether the applicant's expenses should be compared to a "completed use" as homesites or as completion of hypothetical luxury homes, or some other type of dwelling permitted by Yamhill County, is not entirely clear following Friends. The Court instructed the county to explain more precisely the numerator and (especially) the denominator of the ratio test. At the same time, the Court overturned the Court of Appeals ruling that elevated the importance of the ratio test in determining whether a right has vested. The applicant must demonstrate by (at least) a preponderance of evidence in the record the eligible expenses incurred and the total cost of developing the site, and has done so in this case, without effective rebuttal by the opponents. The applicant has presented expenses and ratios in this case that are supported by evidence in the record, are not hypothetical, and that are consistent with Holmes, as explained by Friends.

Factor (2): The good faith of the property owner.

Webster's defines "good faith" as:

> "n : a state of mind indicating honesty and lawfulness of purpose : belief in one's legal title or right : belief that one's conduct is not unconscionable or that known circumstances do not require further investigation : absence of fraud, deceit, collusion, or gross negligence --- usu. used with *in*"[77]

The record supports a conclusion that Maude Youngman and the applicant proceeded in good faith under Measure 37, the law in effect from December, 2004, to December, 2007. The applicant and Maude Youngman filed for state and county waivers under M37, and were granted relief by both entities. The applicant and Maude Youngman then proceeded to design and plat a 12-lot subdivision, and took the above-described substantial steps toward completion of the use, prior to Maude Youngman's death on December 12, 2006. M49 was not referred to voters until June of 2007, ws not adopted until November 6, 2007, and did not become effective until December 6, 2007.

All of the information in the record indicates that the applicant in this case had the legal right to begin development of a 12-lot subdivision, and proceeded according to laws then in effect to obtain approvals and to begin development of the subdivision. Maude Youngman's apparent belief that she had been granted the right, through the waivers, to begin development of a subdivision, was objectively and subjectively reasonable—she had that right at the time, and had no reason to believe that she did not

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[77] Websters Third New International Dictionary (unabridged ed., 1993) at 978.

have the right to pursue the development to completion. The applicant relied in good faith on the waivers granted by Yamhill County and the State of Oregon in pursuing necessary local discretionary permits and approvals. Given the facts of this case, no subsequent Oregon appellate court decisions compel a different conclusion.

Factor (3): Whether the property owner had notice of the proposed change in law before beginning development.

In Holmes, this factor is "whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements." The proposed change in Holmes was from a zone that allowed a chicken processing facility, to a residential zone, which did not. Holmes was before the court because the landowners were being enforced against for building a use not allowed in the zone, without building permits. Six to eight percent of their projected expenditures were incurred by the date of their "notice of * * * proposed zoning," which was enough to vest rights to continue.

In Friends, the Court stated, with regard to this factor:

> "That aspect of good or bad faith turns on what the landowner knew or should have known before incurring any costs to develop the land * * *"[78]

In this case, the applicant's time-period for initiating development and reasonable expenditures began on November 2, 2004, when M37 was adopted. The measure was heavily litigated around the state, declared invalid by the Marion County Circuit Court on October 24, 2005, and upheld by the Oregon Supreme Court on February 21, 2006.[79] In this case, the "proposed change in law" was House Bill 3540, which became Ballot Measure 49. HB 3540 (M49) was submitted for consideration of a house committee on April 12, 2007. Maude Youngman had died on December 12, 2006, before the legislature convened to consider proposed amendments to M37. At the time of the expenditures in this case, M49 had not been proposed or considered, and Maude Youngman had no notice, before beginning development, of M49's "change in law."

Factor 4: Whether the improvements could be used for other uses that are allowed under the new law.

In Holmes, this factor was stated as consideration of:

> "the type of expenditures, i.e. whether the expenditures have any relation to the completed project or could apply to various other uses of the land"[80]

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[78] 351 Or 219, 242, FN 16.

[79] MacPherson v. Department of Administrative Services, 340 Or 117, 130 P3d 308 (2006). Review of all M37 claims was suspended for 139 days during the pendency of MacPherson, which was decided on February 21, 2006. (Footnote to M121524, Youngman state waiver staff report.)

[80] Quoted in Friends at 351 Or 219, 237.

The factor is stated with the disjunctive "or," suggesting that expenditures that have a legitimate relation to the completed project are to be considered in determining the substantiality of the expenditures, and not discounted simply because they may be adapted to other, less intensive uses. The New York court reasoning rejected in Holmes was "that only those expenses that related 'exclusive[ly]' to the proposed development should be considered in determining the ratio."[81] The Holmes approach (above) was to consider all expenditures made by the applicant in good faith toward completion of the project.[82] Friends is intended to be consistent with Holmes. The Court in Friends stated:

> "Under the common law, 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." [83]

In this case, the applicant has submitted substantial evidence that, in good faith, it commenced development of the subject property of 12 homesites, and made substantial expenditures to that end. Opponents have argued that those expenditures should be discounted, but conceded that at least some of the costs incurred cannot be adapted to other uses. It is clear in this case that all of the claimed expenditures were made in a good faith effort to complete the proposed use, and were not made for some other purpose. Even if discounted as proposed by the opponents, as explained by the applicant, they are still substantial. Although some of the development constructed to date could be used for something other than residential development or for residential development in conformance with the new law, the bulk of the costs incurred by the applicant were related specifically to development of the 12-lot subdivision. M49 only allows the property to be divided into three lots, with two of those a maximum two acres each and "clustered" (Section 11).

The site is a partially constructed subdivision, with 12 proposed homesites. Some septic systems have been installed and a well has been drilled. The applicant argues that "Preparation of the plat, surveying, engineering, septic approvals, DEQ permits, road improvements, and access permits as well as the land use applications and hearing expenditures could not be utilized for the benefit of this AF-40 zoned parcel for anything other than subdivision development." The vesting officer accepts this characterization and other evidence of site improvements in the record to conclude that this factor weighs in favor of vesting in this case. Likewise, the contrary arguments of opponents on this point misconstrue the applicable law and the evidence opponents present of "adaptability" is unpersuasive and outweighed by the detailed analysis of the applicant. Even if this factor did not weigh in favor of vesting, vesting is supported by consideration of the other Holmes factors. All of the actions taken by Maude Youngman with regard to the property were consistent with the 12-lot residential subdivision that was proposed.

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81 *Id.* at 236.
82 *Id.* at 237.
83 Id. at 240.

To specifically address claims that the improvements made on the subject property prior to December 12, 2006, may nevertheless be suitable for uses that are currently allowed or could be established, under the new law: In this case, the "new law" (M49) prohibits uses allowed under M37 that are not either completed or "vested." M49 also makes the applicants "eligible" to seek the right to develop a limited number of homesites on their property. No residential uses, other than completed, or incomplete but "vested" uses, are "allowed' of right under M49. The process for obtaining the right to develop four to 10 lots under M49 is too speculative to be considered an "allowed" use. The right of a claimant to request approval of up to three homesites is less speculative, and the record establishes that the applicant has obtained M49 authorization for three home sites. Such uses are "allowed" under M49. To develop the property under M49, the roads, well and septic systems could conceivably be used for the construction of three clustered homes on the site. The vesting officer nevertheless finds that uses legally established on the property are consistent with a 12-lot residential subdivision, are not fully adaptable to full resource use, and are not fully adaptable to the limited residential use that is now allowed under M49. The layout and partial development of this 12-lot residential subdivision would need to either be abandoned or require significant and costly modification to be used for the type and number of lots possible under M49.

Factor (5): The kind of use, location and cost of the development.

Holmes stated this factor as consideration of "the kind of project, the location and ultimate cost." The project, or use in this case, is a 12-lot subdivision. The location of the use is identified on the preliminary plat and in the file. The ultimate cost of development has been explained by the applicants and supported by evidence in the record. The applicants proceeded legally, and made expenditures reasonably calculated to result in approval of a 12-lot subdivision, recording of a final plat, and development of 12 residences, as necessary to establish vested development rights.

The applicant has also explained why the use, location, and cost of the development weigh in favor of vesting in this case, which has been contested by the opponents. Contrary to the claims of opponents, there is nothing about the kind of use, location or cost that differentiates the applicant's proposal from any other rural residential development, or makes the subject property more or less suitable for residential use, or more or less deserving of a right to continue and complete the proposed residential use of the property. The steps taken to develop the property for residential subdivision uses prior to Maude Youngman's death tend to make the property less suitable for uses otherwise allowed in the AF-40 zone.

Factor (6): Whether the owner's acts rise beyond mere contemplated use or preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

In Holmes, the Court stated:

> "Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects."

This is a threshold for establishing the substantiality of expenditures made and steps taken by the applicant to develop the property consistent with valid M37 waivers. The owners' acts in this case rise beyond a mere contemplated use or preparation. All of the steps taken by the applicant to obtain approvals were real, required expenditures and commitments of funds, and were beyond mere contemplation. The site work described in the application and file and preparation of the preliminary plat go beyond "preliminary negotiations with contractors or architects." The development steps in this case were substantial, and went beyond "mere preparation." Arguments regarding this factor made by Friends in this case misconstrue applicable caselaw, and are otherwise not persuasive.

Factor (7) Other relevant factors.

Under the category of "other relevant factors" is the nature of the change in law in this case that distinguishes it from Holmes or the other Oregon vested rights decisions that are based on Holmes: In November, 2004, Oregon land use law, for good or ill, was changed to allow applicants to seek extra-constitutional compensation and/or waiver of land use laws that would otherwise apply.[84]

Following the law (M37), the applicant and Maude Youngman obtained waivers, applied for and received development permits, and substantially commenced construction as required by Holmes. On December 12, 2006, Maude Youngman died, resulting in LUBA's reversal of the County's decision to approve her subdivision. In June of 2007, the legislature referred legislation to voters to dramatically limit the impact of M37—M49. Consistent with Friends, the overarching goal of fairness is best achieved in this case by allowing development to proceed. It is clear that Maude Youngman and the applicant had the right to commence development of a subdivision on the site at the time of her death, and had taken substantial steps to perfect that right. Following Maude Youngman's death, the County approved the proposed subdivision. Fairness in this case dictates that the applicant be allowed to complete the subdivision as a right that vested prior to Maude Youngman's death, and which survived her death as a right of the Youngman Family Trust and its successors in interest.

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[84] *See* Edward J. Sullivan and Jennifer M. Bragar, "The Augean Stables: Measure 49 and the Herculean Task of Correcting an Improvident Initiative Measure in Oregon," 46 Will L. Rev. 577 (2010), (*cited* at 351 Or 219, 223) for a reasonable explanation of why M37 was ill-conceived. The cost of correcting ill-conceived legislation should not be borne by landowners acting in good faith and in compliance with law. The applicant and Maude Youngman appear to have been caught in a legal quagmire not of their making, by first reasonably believing they had been permitted by M37 and state and county waivers to develop a 12-lot subdivision, and by then reasonably believing that M49 "vesting" allowed them to finish what they had started. M49 and Holmes provide a remedy that is equitable under the circumstances of this case.

D.7 Vesting Conclusion

The applicant has demonstrated that its use of the subject property as a 12-lot residential subdivision complies with waivers issued by the State of Oregon and Yamhill County. The applicant has also demonstrated that, by December 12, 2006, the date of Maude Youngman's death, she had perfected a vested right to continue and complete the use described in the waivers.

RECORD

Opponents submitted comments prior to the 21-day deadline established by Ordinance 823, and the applicant supplemented the record with additional information and argument. The record includes all materials timely submitted by the applicants in support of their claim, and timely argument and evidence submitted in opposition, in the original proceeding in this matter and on remand. Also included in the "record of the public entity"[85] in this case are files of the Planning Department related to the applicant's M37 waiver and Planning Docket S-11-06. These County records are available for inspection at the Yamhill County Department of Planning and Development.

FINAL COUNTY VESTING DECISION

The vesting officer, as the review authority under Ordinance 823, makes this final vesting decision on remand of VEST-01-2009. Based on the record and the above findings and analysis, the vesting officer concludes that the applicants have established a common law vested right to complete and continue the development and use of a 12-lot subdivision, by application to Yamhill County for preliminary and final plat approval, and other approvals, as necessary to develop 12 homesites on the property.

IMPORTANT NOTES ON TYPE OF DECISION AND JUDICIAL REVIEW OF DECISION

1. This Final County Vesting Decision constitutes a final county decision that is subject to Judicial Review as explained below. This decision is not a land use decision subject to review by the Land Use Board of Appeals.

2. This Final County Vesting Decision is subject to review by the Yamhill County Circuit Court in a Writ of Review proceeding filed under Oregon Revised Statutes Chapter 34 by an applicant or person who "timely submitted written evidence, arguments or comments" to the county in this proceeding. There are other statutory and ordinance limits on judicial review (See Section 16 of Ballot Measure 49). Sections 6 and 7 of Ordinance 823 provide as follows:

"Section 6. Date Final County Vesting Decision Deemed Complete.

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[85] Ballot Measure 49, Section 16(3)(a).

6.01 The Final County Vesting Decision constitutes a final county decision that is subject to Judicial Review as provided in Section 7 at the time the Review Authority has made and signed a Final County Vesting Decision.

Section 7. Judicial Review of Final County Vesting Decision.

7.01 A Final County Vesting Decision of the Review Authority made under this ordinance is not a land use decision subject to review by the Land Use Board of Appeals.

7.02 A Final County Vesting Decision of the Review Authority made under this ordinance is subject to review by the Yamhill County circuit court in a Writ of Review proceeding filed under Oregon Revised Statutes Chapter 34 by an Applicant or a person who is adversely affected by a Final County Vesting Decision. A person is adversely affected for purposes of this section if the person is a person who submitted written evidence, arguments or comments to the Department of Planning and Development before 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01.

7.03 Judicial review of a Final County Vesting Decision of the Review Authority is:

(1) Limited to the evidence in the record before the Review Authority at the time it made and signed a Final County Vesting Decision, and

(2) Available only for issues that are raised before the Review Authority with sufficient specificity to afford the Review Authority and Applicant an opportunity to respond.

7.04 For purposes of ORS 34.030, the "date of the decision or determination sought to be reviewed" is the date notice was issued under Section 5.02.

(Note: Section 5.02 provides that "Not later than 5 working days after the Review Authority has made and signed a Final County Vesting Decision, the Department of Planning and Development will provide notice of the decision by first class U. S. mail, postage prepaid, to the persons named in [the ordinance].")

DATED AND SIGNED this 7th day of January, 2012.

/s/

Todd Sadlo (Timothy S. Sadlo), OSB #810988
Independent Vesting Officer