OREGONIANS IN ACTION

LEGAL CENTER

MEMORANDUM

FROM: Ross Day

DATE: December 11, 2007

RE: Vested Rights

With the passage of Ballot Measure 49 (2007) (herein "Measure 49"), there has been a lot of discussion and debate about the options available to property owners who filed claims under Ballot Measure 37 (2004)(herein "Measure 37"), received an order from the state of Oregon (herein "State") and their local governmental planning jurisdiction allowing the property owner to develop her property, and began development of her property, relying on the permission she received from the State and the local government to do so.

The Theory of "Vested Rights"

The legal theory at play here is called "vested rights", and it is a common law theory (meaning it is not a legal theory created by a statute or in the Oregon or Federal Constitution) intended to protect property owners and their ability to develop their land.[1]

A vested right is defined as "a right which the law recognizes as having accrued to an individual by virtue of certain circumstances and that as a matter of constitutional law cannot be arbitrarily taken away from that individual."[2]

In essence, a vested right is created when the government gives a property owner permission to develop her property (and presumably use her property) in a particular manner, and the property owner begins development and use of her property to the point where taking away that right to use and develop the property would simply be unfair. A vested right ensures certainty and fairness to a developer so that he or she can be confident that a subsequently enacted regulation will not affect a project.[3]

If you think about it for a moment, this only makes sense. When the government gives a property owner permission to develop her property for a particular use, one would expect the property

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[1] Tyler Kalachnik, *Try to Vest, Try to Vest, Be Our Guest: The Vested Rights Conflict in Indiana Creates a Unique Solution for All Development*, 39 Ind. L. Rev. 417, 420 (2006).

[2] *Id.*, 39 Ind. L. Rev. at 421.

[3] *Id.*, 39 Ind. L. Rev. at 418.

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owner to begin spending large amounts of time and resources developing the property. The property owner is relying on the government's permission as the basis for spending the time and money necessary to develop her property.

The courts have rightly recognized that it would be unfair for the government to take permission away from a property owner after the property owner has spent considerable resources developing her property. The point at which a property owner spent enough time and resources to where the government can no longer take its permission away from the property owner is the point when the property owner's development rights are said to have "vested". *Clackamas County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973).

When Have Your Rights Vested?

The single most commonly asked question under Measure 49 is "How do I know whether my rights have vested under Measure 37?" Unfortunately there is no definite answer any attorney can provide to a property owner. As is discussed below, whether you have a vested right in the development of your property is determined on a case-by-case basis.

To qualify for a vested right in Oregon, you have to have taken substantial steps towards developing your property. *Holmes*, 265 Or. at 197. The logical follow-up question is: How do I know whether I have taken substantial steps towards development?

Again, there is no clear-cut answer. The courts have said that whether a property owner has taken substantial steps towards development can only be determined on a case-by-case basis. *Holmes*, 265 Or. at 197.

There is no bright-line test to determine whether a property owner has taken substantial steps towards development sufficient to vest her development rights in her property. However, the Oregon Supreme Court has articulated six (6) factors to consider and weigh in order to determine whether a person has taken substantial steps towards development sufficient to vest one's development rights. The six factors are:

(1) Ratio of how much the property owner has spent on the project in relation to the total cost of the project;
(2) Whether the property owner, in developing her property, is acting in good faith;
(3) Whether the property owner had advanced notice of the proposed changes to the zoning and/or uses allowed on her property;
(4) The nature of the expenditures made by the property owner. Do the expenditures relate only to the development, or could the expenditures be used for alternative, permitted uses of the land.;
(5) The nature of the development, its location and its ultimate cost; and
(6) Do the acts of the property owner rise beyond mere contemplation of developing the property?

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Although each factor is supposed to be weighed individually, they are not independent of each other. *Union Oil Company, v. Bd. of Commissioners of Clackamas County*, 81 Or.App. 1, 724 P.2d 341 (1986). That is, the weight of one factor may overcome the weight of the other factors in the determination of whether a vested right exists. With that being said, the reported cases in Oregon tend to give less overall weight to factors (2) and (3) than the other four (4) factors. A brief discussion of how the courts consider and weigh each factor follows.

(1) The Ratio - Ratio of how much the property owner has spent on the project in relation to the total cost of the project

In *Holmes*, the Oregon Supreme Court held that a ratio of 1:14 (1 dollar spent for every 14 dollars in total development cost) was a sufficient ratio to weigh this factor in favor of a finding that a vested right existed. In *Holmes*, the property owners spent $33,000 towards a total project cost of somewhere between $400,000 and $500,000.

Some attorneys will advise that – at a minimum – a property owner is required to send at least 1/14th (approximately 7%) of the total project cost in order to satisfy the Ratio calculation under *Holmes.* However, Oregon courts have not always employed the *Holmes* ratio methodology to determine whether a property owner has vested her development rights.

For instance, in *Eklund v. Clackamas County*, supra., the property owner had spent approximately $165,000 towards development of the property. However, the record contained no evidence regarding the ultimate project cost, making it impossible to calculate any ratio. Nevertheless, the Court of Appeals held that the amount of money spent on the project was "substantial" [4]

However, to give you an idea of the range upon which a court will determine a ratio low enough to weigh in favor of a finding that a vested right exists, in *Union Oil Co. Of Calif. v. Bd. of County Commissioners of Clackamas County*, supra., the ratio of amount spent to total project cost was 1 to 47. The Court of Appeals held that the ratio was too low and did not find the ratio factor weighed in favor of a finding that a vested right was created.[5]

There are two points of contention in the calculation of the ratio for purposes of determining whether a vested right exists. First, what is the "project" for purposes of determining the total

[4] See also, *Milcrest Corp. v. Clackamas County*, 59 Or. App.177, 650 P.2d 963 (1982) (holding that expenditure of one million dollars towards development of a 1,523 unit subdivision - with no final project cost in the record – resulted in a ratio that weighed in favor of a finding that a vested right was created); cf. *Webber v. Clackamas County*, supra., where the Court of Appeals also did not have evidence in the record of a total project cost for a multimillion dollar subdivision and therefore held the $110,000 spent in development costs resulted in a ratio too low to weigh in favor of finding a vested right existed.

[5] In *DLCD v. Curry County*, supra., the Land Use Board of Appeals held that a ratio of 1 to 50 was too low to weigh in favor of a finding that a vested right existed.

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project cost. Second, what expenditures can be included in determining how much money a property owner has spent in furtherance of the development.

In *Webber v. Clackamas County*, 42 Or. App. 151, 600 P.2d 448 (1979), the Oregon Court of Appeals decided that the total project cost included not only the cost of site preparation but also the total cost of the residential development, even though the property owners had no intention of developing the property themselves.

In *Union Oil Co. Of Calif. v. Bd. of County Commissioners of Clackamas County*, 81 Or. App. 1, 724 P.2d 341 (1986), the Oregon Court of Appeals explained what expenditures could be included in the calculation to determine how much a property owner has spent in furtherance of developing property. The property owner in *Union Oil* contended that the purchase price of the property should be included in the calculation of how much was spent on development of the property for purposes of the ratio test.

The Court of Appeals in *Union Oil* rejected the property owner's argument that the purchase price of the property should be included in the calculation to determine how much money was spent on developing the property. The Court of Appeals reasoned that the concept of vested rights presupposes that the property is already owned by the person seeking the use under the vested rights theory. In other words, the concept of a vested right lies in the use of the property, not the acquisition and use of the property. The Court of Appeals concluded that the only expenditures that can be included in the calculation of the amount spent on the project, for purposes of the ratio test, is the amount spent that is directly related to the use sought under the vested rights theory. *Union Oil*, 81 Or. App. at 8.

In *Pohrman v. Klamath County Commissioners*, 25 Or.App. 613, 550 P.2d 1236 (1976), the property owner owned 3400 acres that was not zoned when he purchased the property. The property owner had always intended to develop the property into 20-acre lots as a "recreational subdivision." The county rezoned the property to a zoning designation that did not allow the owner's desired "recreational subdivision". The property owner claimed he had a vested right to develop his property based on expenditures made in contemplation of developing the property. However, in the two years between when the property owner acquired the property and when the property was rezoned, the property owner spent only $14,000 having the land surveyed and septic test holes dug. The Court of Appeals held that the property owner's actions did not rise above mere contemplation of the development, and was therefore insufficient to establish a vested right to develop the property as a "recreational subdivision".

In *Clackamas County v. Portland City Temple*, 13 Or.App. 459, 511 P.2d 412 (1973), the property owners wanted to use a portion of their property as an airplane landing strip. The property owners did not spend any of their own money in developing the landing strip and used materials already located on the property. Given the lack of any expenditures by the property owners, the Court of Appeals held that the property owners could not satisfy the ratio test and therefore declined to find a vested right existed.

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Even though each of the *Holmes* factors is to be weighed individually, without question the predominant factor courts rely upon is the Ratio factor, even though *Holmes* is clear that other factors should be considered. Presumably because there is no bright-line rule to determine when a person's rights to develop property have vested, courts have used the Ratio factor as a pseudo-bright-line rule. The line of demarcation for the Ratio factor, at least for now, seems to be the *Holmes* 1:14 ratio, although as is the case in most areas of the law, the courts have made certain exceptions.

(2) Good Faith - Whether the property owner, in developing her property, is acting in good faith;

Given the reaction by some counties to the fact that many Measure 37 claimants may have vested their rights under Measure 37, it is clear that the "good faith" factor under *Holmes* is going to be a hotly contested matter. Some counties are taking the position that expenditures and efforts made after a certain date to vest one's rights are not expenditures and efforts made in "good faith" and therefore cannot be considered when determining whether a property owner has vested her rights under a Measure 37 claim.[6]

The local governments who are asserting this extremely narrow application of the theory of vested rights justify their position by claiming that Measure 37 claimants had reason to know as early as June 15th, 2007, that the law might change and the rights restored by Measure 37 would be taken away by Measure 49. The government's conclusion is that any expenditures or efforts made after June 15th, 2007, were made for the sole purpose of avoiding Measure 49's changes. And if the sole purpose of an expenditure or effort was to avoid Measure 49, the government considers such an expenditure to be taken in bad faith.

In *Clackamas County v. Holmes*, infra., Clackamas County argued that the steps taken by the property owners to develop their property were not taken in "good faith", because even though the property owners spent a considerable sum of money developing their property prior to the change in zoning on the property, an equally significant amount of money and effort was spent developing the property after the zoning on the property changed. Even though the property owners in *Holmes* continued to develop their property after the zoning change on their property, the Oregon Supreme Court nevertheless held the property owners had acted in good faith.

In *Webber v. Clackamas County*, supra., the Court concludes that the expenditures made by the property owners were made in good faith because the developments made by the property owners were made without any knowledge of the more restrictive density controls that were about to go into effect. *Webber*, 42 Or.App. at 155.

[6] Some counties and property rights opponents have advocated that expenditures and development after June 15th, 2007, were not taken in good faith. June 15th, 2007, is the date the Oregon Legislature first made the first draft of Measure 49 (which was subsequently amended before being referred to the people) available to the public. Others have argued that expenditures made after June 24th - the day the Oregon Legislature referred Measure 49 to the voters - should be considered expenditures made in bad faith.

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In *Eklund v. Clackamas County*, 36 Or.App. 73, 583 P.2d 567 (1978), the Court of Appeals was again tasked with the duty to determine whether a property owner's rights to develop the property had vested. The development at question in *Eklund* was a 108-unit subdivision that was developed into four phases. With the first three phases complete, the question was whether the property owner had a vested right to develop the fourth phase.

In reaching the conclusion that the development occurred in "good faith", the Court of Appeals noted that the development to date was done consistent with prior zoning of the property, and development occurred with the approval of all the appropriate planning authorities. *Eklund*, 36 Or.App. at 82.

Reconciling the case law regarding the "good faith" factor of the vested rights analysis is difficult because it appears at times the Oregon appellate courts confuse the idea of "good faith" with the third factor in the vested rights analysis - prior knowledge of future changes in the land use laws (more on this factor, next).

Be that as it may, whether or not a property owner has developed her property in "good faith" appears to rest on whether, at the time the development started, the development activities were conducted lawfully. That is, did the property owner comply with the permit, inspection and other obligations commonly required when one is developing her property. If so, then the property owner acted in good faith.

(3) Prior Knowledge - Whether the property owner had advanced notice of the proposed changing to the zoning and/or uses allowed on her property;

As mentioned in the discussion of factor (2) of the vested rights analysis, above, the third factor in the vested rights analysis - whether the property owner had prior knowledge of future changes to the zoning designation of the property – appears to be a subset of the "good faith" factor in the vested rights analysis. When determining whether a property owner has acted in "good faith", Oregon courts apparently evaluate first whether the property owner, in pursuit of her vested rights, did so lawfully and with clean hands.

If the court determines that a property owner moved forward with her development in "good faith", the courts then examines whether the property owner proceeded forward with development even though the property owner knew that the governing body responsible for zoning the uses on the property was about to change the uses allowed on the subject property. That is, did the property owner have prior knowledge that the uses allowed on her property was about to change?

In nearly all the reported vested rights cases in Oregon, courts combine the "Good Faith" and "Prior Knowledge" into one analysis and call it "good faith". Given the express language of the Supreme Court's decision in *Holmes*, it is clear the Oregon Supreme Court considers the "good faith" and "prior knowledge" factors to be separate and distinct factors.

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For instance, in *Holmes*, the Oregon Supreme Court considers separately the fact that the property owners purchased their property in 1963, and immediately began work developing their property until the zoning ordinance was changed in 1966. The fact that the property owners in *Holmes* began work well before the passage of the 1966 zoning ordinance by Clackamas County triggered a finding from the Oregon Supreme Court that the property owners did not have prior knowledge of the change in the zoning ordinances. Later, the Court held that in addition to the discussions regarding the Ratio factor and the Prior Knowledge factor, the Good Faith factor also weighed in favor of the property owners. The Oregon Supreme Court's own analysis in *Holmes* demonstrates that the Good Faith and Prior Knowledge factors should be considered separately.

Application of the Prior Knowledge factor is important because courts and tribunals will use the Prior Knowledge factor to determine which development expenditures can be considered in the application of the Ratio factor.

In *DLCD v. Curry County*, 19 Or. LUBA 249 (1990), the Oregon Land Use Board of Appeals (herein LUBA) held that expenditures made after the property owner became aware of the change in the law could not be included in the total amount spent on development for purposes of the Ratio factor.

In *DLCD v. Curry County*, LUBA also addressed when a property owner acquires prior knowledge of a change in the property's zoning. At issue in *DLCD v. Curry County* was whether the county properly took exceptions to Statewide Planning Goals 3 and 4, but not to Statewide Planning Goal 14. In 1986, the Oregon Supreme Court ruled that the county should have also taken an exception to Goal 14, and reversed the decision of the county. The property owners did not learn of the Oregon Supreme Court's decision until 1988. Nevertheless, LUBA held that the property owners in *DLCD v. Curry County* had constructive knowledge of the Court's decision as of 1986, and therefore none of the expenditures made between 1986 and 1988 could be included in the calculation of the amount spent on the development for purposes of the Ratio factor. See also *Schmaltz v. City of Hood River*, 22 Or. LUBA 115 (1991).

It is no secret that property rights opponents (and some counties) are going to argue that expenditures made by Measure 37 claimants after June of 2007 should not be included in the calculation of the amount spent on development, for purposes of the Ratio factor. Their argument seems to be that Measure 37 claimants had, as of June of 2007, at least constructive knowledge that the law protecting their property rights might change at the November 2007 election. In essence, property rights opponents making this argument are claiming that development expenditures made after June of 2007 were made in bad faith, and therefore factors (2) and (3) from *Holmes* weighs in favor of a finding that no vesting has occurred.

In *DLCD v. Curry County* LUBA addressed a similar argument. Opponents of the development in *DLCD v. Curry County* argued that the Supreme Court's decision holding that the county should have taken an exception to Goal 14 in addition to the exceptions already taken for Goals 3 and 4 established that the law from the outset required an exception to Goal 14. Therefore, the opponents argued, the property owners at least had constructive knowledge of the law from the

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outset of the development. The opponents asked LUBA to conclude that the money spent on development from the outset of the project should not be included in the calculation of money spent on the project for purposes of the Ratio factor.

LUBA declined the opponents' invitation. Even though the law may have required an exception to Goal 14, in addition to the exceptions to Goals 3 and 4 already taken, LUBA recognized that at the time the property owner made the development expenditures the law on this point was not settled. Therefore, LUBA concluded, because the law was not settled, any money spent on development up to the date of the Supreme Court's decision could properly be included in the calculation of money spent on the project for purposes of the Ratio factor.

Likewise, Measure 37 claimants who spent money on development after June of 2007 should raise the same defense. Even though the Legislature referred Measure 49 to the voters in June of 2007, there was no way of knowing the result of the election prior to November 6th, 2007. In other words, there could not be any "prior knowledge" of a proposed change in zoning on the property owner's property.

(4) Nature of Expenditures –	The nature of the expenditures made by the property owner. Do the expenditures relate only to the development, or could the expenditures be used for alternative, permitted uses of the land.;

The fourth factor from *Holmes* - the "nature of the expenditures" factor – examines the nature of the expenditures used in the calculation of the ratio in the Ratio factor (see (1), above). The fourth factor seeks to determine whether the expenditures were made for a purpose that could only be put to use by the proposed development.

In *Webber v. Clackamas County*, 42 Or.App. 151, 600 P.2d 448 (1979), the property owners wanted to develop their 127-acres of land into half-acre lots, a use permitted at the time the property owners acquired their property. In furtherance of the desired development, the property owners spent approximately $110,000 installing a water system intended to serve each of the half-acre lots.

In 1974, Clackamas County re-zoned the property and reduced the density of the property to 5-acre minimum lot size. The question the Court of Appeals was asked to resolve was whether the expenditure was sufficient to establish a vested right in the planned half-acre development.

The Court of Appeals ruled against the property owner. Analyzing the facts of the case, the Court said that – with respect to the 4th factor from *Holmes* – that the water system could be used for something other than residential development. The evidence in the record demonstrated that the property owner used the water system in the past to sell water to neighbors who needed water. Although not the most profitable use of the land, the Court nevertheless held that because the water system could be used for purposes other than residential development, the 4th *Holmes* factor weighed against a finding that a vested right had been created.

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Compare the Court of Appeals decision in *Webber* with its decision in *Eklund v. Clackamas County*, infra., where the issue of whether the construction of a community water supply was enough to establish a vested right. In *Eklund*, the property owner wanted to building 108 units on 80 acres of land. Although the development was originally supposed to be completed in one phase, financing difficulties made development a 4-phase proposition.

Unlike the water system at issue in *Webber*, the water supply system in *Eklund* could only be used to deliver water to the 108 dwelling units proposed for construction. Even though some of the expenditures were consistent with other allowable uses (i.e. clearing the land is consistent with agricultural practices) the Court of Appeals held that the totality of the expenditures made by the property owners in *Eklund* related directly to the proposed development.

In *Clackamas County v. Portland City Temple*, infra., the property owner claimed to have a vested right in the use of the subject property as an airstrip and airplane hangar. Immediately before the county rezoned the subject property to rural residential, the property owners undertook substantial construction on an accessory farm building the property owners planned on using as a hangar.

However, the property owners spent virtually nothing on the building, and even testified that the materials they used were found on the subject property. The property owners made no expenditures towards vesting their rights, and the result was an accessory farm structure that could be used for farming as much as it could be used as an airplane hangar. Accordingly, the Court of Appeals declined to find a vested right existed.

The fourth factor from *Holmes* rest on whether the development to date can be used for something other than the original development plan. If the development can be used for something other than what ultimately is to be built, the courts will not consider those costs in the calculation and consideration of the Ratio factor.

(5) Nature of the Development – the Nature of the Development, its Location and its Ultimate Cost; and

The fifth factor from *Holmes* is similar to the fourth factor, except that the fifth factor bears more directly on the final determination of whether a vested right exists. Applying the fifth factor from *Holmes*, courts simply examine whether the development that has occurred to date on the subject property can be used for any purpose other than the proposed development. If so, then the fifth factor weighs against a final determination that a vested right exists.

Again in *Clackamas County v. Portland City Temple*, infra., the property owner claimed to have a vested right in the use of the subject property as an airstrip and airplane hangar. Immediately before the county rezoned the subject property to rural residential, the property owners undertook substantial construction on an accessory farm building the property owners planned on using as a hangar. However, given the fact that the only development on the rural property was an accessory farm structure and nothing much else, the Court of Appeals held that the nature of the

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development that had already taken place on the property did not warrant a finding that a vested right existed.

Compare the nature of the development in *Portland City Temple* with the development in *Holmes*. The property owner in *Holmes* dropped an 843-foot well, with pumps sufficient to not only irrigate the property but also properly dispose of waste water. In addition, the property owner had special transformers installed on the property sufficient to meet the needs of the irrigation system and the processing plant. Finally, the property owner spent thousands of dollars planting special grasses that would control the spread of bacteria from the processing plant.

The Supreme Court in *Holmes* held that the development of the property was far more than what was needed for the typical agricultural operation. The Court held that the nature of the development was more in line with a chicken processing plant than a typical farm. Accordingly, the Court held that the nature of the development in *Holmes* weighed in favor of a finding that a vested right existed.

(6) More Than Contemplation – Do the acts of the property owner rise beyond mere contemplation of developing the property?

In order to secure a vested right, the actions taken by a property owner towards development must rise above what the Oregon Supreme Court considers to be "mere contemplation." *Holmes*, 265 Or. at 199. The Court in *Holmes* gives specific examples of actions that should only be considered acts of "mere contemplation": leveling of land, boring test holes or preliminary negotiations with contractors and architects. *Id.*

In *Pohrman v. Klamath County Commissioners*, infra., the Court of Appeals applied the Court's "mere contemplation" factor. The property owner spent about $14,000 having the property surveyed and test holes dug for a septic system. The principle question in *Pohrman* was whether the property owner's expenditures amounted to more than mere contemplation of development. Citing directly from the Supreme Court's language in *Holmes*, the Court of Appeals held that the property owners expenditures and actions were nothing more than mere contemplation of development.

Given the Supreme Court's language in *Holmes*, and the application of the "mere contemplation" factor in *Pohrman*, it seems relatively clear that expenditures made for such things as preparing plat maps, surveys, test holes, clearing of land and other preparatory actions will not swing the "mere contemplation" factor in favor of the property owner.

CONCLUSION

It is important for all Measure 37 claimants who believe they have vested their Measure 37 rights to understand that determining whether a vested right exists will be determined on a case-by-case basis. There is no bright-line test that will reveal with absolution when a property owner has vested her Measure 37 rights in her property. Instead, given the Supreme Court's command in

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Holmes, property owners will be left guessing whether they have spent enough time and money developing their property in order to obtain a vested right.

In addition, it is important to understand that the six *Holmes* factors are not criteria. That is, the six factors do not each have to be satisfied. Instead, each factor is weighed both individually and against each other in order to determine whether a vested right exists.

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