

**37. Vested Rights.** Where LUBA concludes that a local government's conclusion that an application did not meet an applicable approval criterion was a valid basis for denial, although any error committed with respect to alternative or independent bases for denial would generally not provide a basis for reversal or remand, remand is nonetheless required where LUBA also concludes that the local government failed to address a threshold argument from the applicant that, if correct, would prevent the local government from applying criteria that would prohibit approval of the application. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

**37. Vested Rights.** A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincoln County*, 79 Or LUBA 549 (2019).

**37. Vested Rights.** LUBA will not resolve assignments of error challenging an alternative theory of approval, vested rights, that the parties argued about below, but which the final decision maker did not consider. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

**37. Vested Rights.** LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

**37. Vested Rights.** Where the applicant for a vested right determination argued below that it had not lost its vested right and argued for an interpretation of the vested rights standard that would result in a conclusion that the vested right had not been discontinued, on appeal to LUBA the applicant has not waived the ability to challenge the interpretation the local government adopted to support its conclusion that the vested right had been discontinued, even if the applicant's specific arguments against that interpretation were not raised below. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

**37. Vested Rights.** Because a vested right is a species of nonconforming use, the general principles of nonconforming use (including discontinuance) apply to vested rights determinations, at least in counties subject to ORS 215.130. Under ORS 215.130, to determine whether a nonconforming use or vested right to complete a nonconforming has been lost through discontinuance, the local government must look back in time. Depending on the facts, it is possible that a nonconforming use or vested right could be lost through discontinuance prior to the date that the applicant seeks verification of the nonconforming use or vested right. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

**37. Vested Rights.** LUBA will affirm a city governing body's code interpretation to the effect that a vested right to complete what will be a nonconforming use is lost through discontinuance, if the

applicant makes no effort toward completion of the use during a 12-month period, where that interpretation is consistent with the express language, purpose and policy underlying the code provision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

**37. Vested Rights.** Under Section 5(3) of Ballot Measure 49 (2007), a property owner may complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37 waiver. Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49, however, where the property owner claims to have a vested right based on a previously issued building permit, not a Ballot Measure 37 waiver, LUBA has review jurisdiction over a county decision that the property owner does not have a vested right under the building permit. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

**37. Vested Rights.** Under the Court of Appeals' decision in *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 224, 31 P3d 458 (2001), statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

**37. Vested Rights.** The right that the holder of a vested right has is the right to continue "construction" of a proposed use until construction of that proposed use is complete and the vested right (an inchoate nonconforming use) is converted to a nonconforming use that is fully established. It is the continued "construction" of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than the time specified for nonconforming uses, to avoid losing a vested right to continue construction of that vested right. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

**37. Vested Rights.** It is not inconsistent with ORS 215.130(5) to interpret the ORS 215.130(5) requirement that a nonconforming use not be abandoned or discontinued for a longer period than specified under local law to apply in the context of a vested right to complete construction of a use to require that "substantial efforts to finish the development" of the use not be abandoned or discontinued for the specified period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

**37. Vested Rights.** Where a county finds that a property owner discontinued construction of a house for at least one year during a 30-year period, even if the property owner is given the benefit of the doubt in his contentions that over that 30-year period at unspecified times he repaired concrete scaling and did some plumbing work, framing, grading and road construction, the county's finding is supported by substantial evidence where other evidence shows there was almost no construction activity during that 30-year period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

**37 Vested Rights.** A site plan decision that approves (1) a building and (2) a "future expansion" of that same building is a single building, not separate phases or components of a multi-phase development, for purposes of determining whether there is a vested right to construct the

expansion. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**37 Vested Rights.** To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**37 Vested Rights.** A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**37 Vested Rights.** Remand is necessary where a city concludes that an applicant has a vested right to construct an expansion of a nonconforming use, but the city fails to resolve issues fairly raised below regarding whether the vested right has been lost through discontinuance under the common law cases that the city's vested right conclusion rests upon, or through the city's nonconforming use code. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**37 Vested Rights.** For purposes of applying the expenditure/project ratio test in *Clackamas County v. Holmes*, comparing actual expenditures to date to total project cost, it is unnecessary for the applicant to submit evidence of the actual amount of expenditures to construct a 72,000-square-foot retail store or evidence of the cost to complete the expanded 102,000-square-foot store, because by any measure the actual expenditures to date to construct the 72,000-square-foot store would far exceed the expenditures to complete the 102,000-square-foot store. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**37. Vested Rights.** A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

**37. Vested Rights.** Under *Clackamas County v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973), and the appellate court cases that have followed and elaborated on *Holmes*, where a property owner commences development of his or her property at a time when there are no land use laws or at a time when the development is permitted under existing land use laws, that property owner can achieve a right to continue and complete that development, notwithstanding that land use laws that would preclude that development are enacted during the development process and before development is complete. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

**37. Vested Rights.** A common law vested right under subsection 5(3) of Measure 49 will shield a claimant from land use laws that were waived under Measure 37; but that common law vested

right will not shield a claimant from land use laws that were not waived under Measure 37 and therefore remain applicable to the claimant's development. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

**37. Vested Rights.** Measure 37 claimants who on December 6, 2007 had already received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, then they may proceed to complete the development that was begun under Measure 37. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

**37. Vested Rights.** Measure 37 claimants who on December 6, 2007 had not yet received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, they must still obtain any permits or other approvals that are required under land use laws that were not waived by their Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

**37. Vested Rights.** A vested right based upon substantial expenditures toward construction of a building is properly viewed as an inchoate nonconforming use, not as a distinct entitlement immune from all limitations applicable to nonconforming uses. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

**37. Vested Rights.** Vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights, *i.e.*, the holder must continue development of the nonconforming use and not abandon or discontinue efforts to complete development. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

**37. Vested Rights.** Statutory provisions governing nonconforming uses at ORS 215.130 also govern vested rights, including the delegation of authority to counties to establish criteria under which such rights have been interrupted or abandoned. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

**37. Vested Rights.** Abandonment of a vested right, like abandonment of a nonconforming use, requires evidence of intent to relinquish a known right. Where the only evidence relevant to intent shows that the landowner maintained the uncompleted structure during the relevant period, the county errs in determining that the landowner has abandoned the right to complete and use the structure. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

**37. Vested Rights.** Where the county views a vested right to be discontinued under its code if there is discontinuance of substantial effort to finish the development for any reason for more than two years, evidence that the landowner maintained an uncompleted structure but made no effort to finish the structure for three years was sufficient to support a finding of discontinuance. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

**37. Vested Rights.** That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

**37. Vested Rights.** The judicial doctrine of vested rights does not apply to development allowed under a conditional use permit, where the permit is approved under an ordinance obligating the user to commence construction within six months or request an extension from the city. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

**37. Vested Rights.** Prior to the creation of LUBA, circuit courts had jurisdiction to declare the existence of vested rights to develop land under previously existing land use regulations. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

**37. Vested Rights.** Claim preclusion applies to preclude relitigation of a claim that has been litigated. Where a party's claim of a vested right to residential use of certain property was determined in a circuit court judgment, to which the local government and other parties to the LUBA appeal were also parties, the local government is precluded from making a new determination on that vested right claim, even if it would otherwise have jurisdiction to do so. *Joines v. Linn County*, 24 Or LUBA 456 (1993).

**37. Vested Rights.** In the absence of a code requirement to the contrary, a provision in a local code authorizing the development of a parcel to proceed to completion so long as "substantial construction" occurs within a certain period of time does not require the application of a traditional vested rights analysis. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

**37. Vested Rights.** Where the issue on appeal is whether petitioner has a vested right to develop property in a manner inconsistent with current zoning regulations, and the resolution of that issue requires the application of city land use regulations from 1973 to the present, the challenged decision is a land use decision subject to LUBA's jurisdiction. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

**37. Vested Rights.** Where a local government approved a height variance in 1977, but at that time had no code provision authorizing density transfers or a master plan approval process, the 1977 height variance approval does not also authorize a density transfer or give master plan approval. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

**37. Vested Rights.** To establish a vested right to construct 150 units on a particular lot, a local government must determine that qualified expenditures were made toward development of that particular lot at a time when the construction of 150 units on that lot did not require approval from such local government, or were made at a time when the required approvals were given. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA

(1991).

**37. Vested Rights.** The lawful uses protected from newly enacted regulations include those which do not yet exist, but have proceeded towards completion to a significant degree. In such instances, the property owner is said to have a *vested right* to complete and continue the development. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

**37. Vested Rights.** Expenditures considered in determining the existence of a vested right must have been made at a time when the proposed development did not require approvals, or at a time when required approvals were given. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

**37. Vested Rights.** Where property owners have not applied for and obtained a required conditional use permit prior to a change to a more restrictive zone, they cannot acquire a vested right to complete development of a use which required conditional use approval under the original zoning. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

**37. Vested Rights.** The expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when required approvals were given. Where no local partition approval was given prior to the adoption of an ordinance requiring such approval, the only expenditures which may be considered in a vested rights determination are those made before the effective date of such ordinance. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

**37. Vested Rights.** Evidence that at a time when development was allowed, a landowner placed two homes on the parent parcel and obtained two septic, plumbing and well drilling permits for such parcel, at best, establishes that the landowner contemplated creating two parcels from the parent parcel. However, these expenditures are not “substantially and directly” related to further dividing the parent parcel. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

**37. Vested Rights.** Under *Holmes* factor (7) (“ratio of expenditures”), a local government is required to identify and compare the total project cost with only those expenditures that are properly considered in determining the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** Distinguishing those expenditures *properly* considered in a determination of the “ratio of expenditures” under *Holmes* factor (7) requires (1) identification of the time at which the expenditures were made, (2) an analysis of whether the expenditures were made in good faith and lawful when made, and (3) a determination regarding whether the expenditures are directly related to the proposed use of the property. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** Expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when approvals were given. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** After the Oregon Supreme Court issued a decision determining that Goal 14 must be complied with before the existing zoning of the subject property could be considered lawfully applied, any expenditures made in contemplation of dividing and developing the subject

property, consistent with the existing zoning, could not properly be considered in a vested rights determination. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** There is no general rule that all expenditures relating to development of land in Oregon, made in furtherance of a vested right, must have been made before promulgation of the Statewide Planning Goals. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** In the absence of findings, or evidence in the record, which establishes that the price paid for purchase of a 10,000-square-foot parcel was a “premium” or an otherwise unreasonable price to pay to enlarge the parent parcel for the division and development which has already occurred, the purchase price for the 10,000-square-foot lot should not be included in the qualified expenditures used to determine existence of a vested right to create additional parcels developable with three residences. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** Where the total qualified expenditures are at most 2,480.68 dollars, total development cost is 126,000 dollars, and the ratio of expenditures to cost is, therefore, at most 1:50, this expenditure total and “ratio of expenditures” under *Holmes* factor (7) are, as a matter of law, insufficient to demonstrate that the amount of expenditures is “substantial,” and do not establish the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

**37. Vested Rights.** Under *Holmes* factor (7) (“ratio of expenditures”), a local government is required to identify and compare the total project cost with only those expenditures which are properly considered in determining the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

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**37. Vested Rights.** Expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when approvals were given. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

**37. Vested Rights.** After the Oregon Supreme Court issued a decision determining that Goal 14 must be complied with before the existing zoning of the subject property could be considered lawfully applied, any expenditures made in contemplation of dividing and developing the subject property, consistent with the existing zoning, could not properly be considered in a vested rights determination. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

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**37. Vested Rights.** In order to determine the “ratio of expenditures” under *Holmes* factor (7), a local government must adopt a finding concerning total project cost. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).