BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CURRY COUNTY, Respondent, and CHARLES W. CRONENWETT, Intervenor-Respondent.	LUBA No. 90-021 FINAL OPINION AND ORDER

Appeal from Curry County.

Larry Knudsen, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General.

No appearance by respondent.

Charles W. Cronenwett, Wedderburn, filed a response brief and argued on his own behalf.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee; participated in the decision.

REMANDED 06/05/90

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the Curry County Board of Commissioners approving "the creation of three lots of less than five acres each in a RR-5 [Rural Residential, 5 acre minimum] zone under a non-conforming use vested rights theory." Record 1.

MOTION TO INTERVENE

Charles W. Cronenwett moves to intervene on the side of the respondent. There is no objection to the motion, and it is granted.

FACTS

The material facts are set out in the Petition for Review as follows:

> "The subject property is in southern Curry County in the Cape Ferrelo area. It is located outside of the Brookings Urban Growth Boundary. The property consists of 7.76 acres of vacant ocean view land. Surrounding land is in single family residential use on parcels ranging in size from 1 to 27 acres.
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> "In 1982, the County zoned the property Rural Residential 2.5 (RR-2.5). (The RR-2.5 zone requires a minimum of 2.5 acres for residential development.) This zoning designation was based upon exceptions to Goals 3 and 4. In 1984, LCDC acknowledged the plan and zoning regulations. In 1986, the Oregon Supreme Court remanded LCDC's acknowledgement based upon the failure of the County to take an exception to Goal 14. 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986). In 1989, the property was rezoned RR-5 which requires a minimum of five acres for development.

"The property in question is designated as Tax Lot 2000. Prior to 1982, it was part of a larger tract. In 1982, the County approved a partition of Tax Lot 2000 which created another parcel designated Tax Lot 2014. In 1983, the Respondent and the owner of Tax Lot 2014 agreed to a boundary line adjustment which further reduced Tax lot 2000 to its present size.

"Apparently, the Respondent originally intended to subdivide the subject property. With this in mind, he surveyed the property, prepared maps showing proposed lots, and filed the maps with the County. The subdivision process was not completed.

"In 1984, the Respondent obtained three favorable site evaluations for septic systems. In 1987, he listed the property for sale as three separate tracts designated as the Western, Middle, and Eastern Tracts of Tax Lot 2000. In 1988, the Respondent obtained three permits to appropriate surface water from an unnamed creek on the property and he installed a water system for each of the three 'tracts.' Also in 1988, he arranged for certain utility services (electricity, cable TV and telephone) to be provided for the 'tracts.'

"The County made the following findings as to the Respondent's expenditures:

"a) Surveying of property (1982) $2,534.50

"b) Fee for septic evaluations(1984) 275.00

"c) Fee for water rights (1988) 1,600.00

"d) Install water systems (1988) 8,500.00

"e) Excavation for utilities (1988) 1,413.00

"f) Road sign fees (March 1989) 60.00

"Total $14,382.50

"The Respondent sought and the county granted

approval to partition the property into three parcels of less than five acres each. Each proposed parcels [sic] would have an area of approximately 2.5 acres.

"The County concluded that the applicable decision criteria were the zoning ordinance provisions relating to the maintenance of a nonconforming use and the case law relating to the establishment of a vested right to continue the development of a nonconforming use." Petition for Review 3-5. (Record citations omitted.)

Petitioner appeals the county's decision.

SECOND ASSIGNMENT OF ERROR

"The county failed to comply with the Statewide Planning Goal 14."

FOURTH ASSIGNMENT OF ERROR

"The county improperly construed and failed to properly apply the so-called Clackamas County v. Holmes factors."

The factors to be considered in determining whether there have been substantial expenditures toward development, giving rise to the existence of a vested right to develop property in a manner not allowed by current land use regulations, have been derived from the Oregon Supreme Court's decision in Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973). In Polk County v. Martin, 292 Or 69, 81 n 7, 636 P2d 952 (1981), the Supreme Court quoted with approval the following factors (Holmes factors) as relevant in considering a claim of vested rights to development:

"1. The good faith of the property owner in making expenditures to lawfully develop his property in a given manner;

"2. The amount of notice of any proposed re-zoning;

"3. The amount of reliance on the prior zoning classification in purchasing the property and making expenditures to develop the property;

"4. The extent to which the expenditures relate more to the nonconforming use than to the conforming uses;

"5. The extent of the nonconformity of the proposed use as compared to the uses allowed in the subsequent zoning ordinances;

"6. Whether the expenditures made prior to the subsequent zoning regulations show that the property owner has gone beyond mere contemplated use and has committed the property to an actual use which would in fact have been made but for the passage of the new zoning regulation;

"7. The ratio of the prior expenditures to the total cost of the proposed use.

"If the evidence relative to these factors establishes a 'vested right,' the property owner may complete his improvements and thereafter use his property in a manner which is a nonconforming use, subject to the restrictions on nonconforming uses * * *." (Emphasis in original.)[1]

Most of these factors relate to the character of the expenditures made to further a particular use. For the reasons stated below, we believe the county erred in

[1]These factors are from Cable and Hauck, "The Property Owner's Shield - Nonconforming Use and Vested Rights," 10 Will L J 404, 411-412 (1974).

applying the Holmes expenditure factors.[2]

One determination necessary to ascertain whether a property owner has incurred substantial expenditures toward completion of development, giving rise to a vested right, is the "ratio of the expenditures," Holmes factor (7), quoted above. Union Oil Co. of California v. Clackamas County, 14 Or LUBA 719, 724, aff'd 81 Or App 1 (1986); Cook v. Clackamas County, 50 Or App 75, 622 P2d 1107 (1981) (Cook). Under the "ratio of expenditures" Holmes factor, we believe, as explained below, the county 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. Union Oil Co. of California v. Clackamas County, 14 Or LUBA at 724-725.

In Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., 81 Or App 1, 6, 724 P2d 341 (1986), the Court of Appeals explained the Holmes factors are not to be applied in isolation. The Court of Appeals explained that expenditures considered in determining the existence of a vested right must be "substantially and directly related to the project." The Court rejected the petitioner's argument in Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., that the ratio of expenditures test should include all expenditures made in

[2]There is no dispute, under the first Holmes factor, regarding intervenor's good faith in making expenditures to develop the subject property.

furtherance of development, regardless of whether those expenditures are properly considered under the other Holmes factors. The Court stated that the "substantial expenditure calculation," which in that case bore a ratio of only 1:47, properly excluded the purchase price for the subject property. Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., 81 Or App at 5 n 1. Additionally, in Cook, 50 Or App at 83, the Court of Appeals determined that the trial court below had properly included only qualified expenditures (as determined by the other Holmes factors) in the "ratio of expenditures." Accordingly, it is reasonably apparent that only expenditures qualified under the other Holmes factors, are properly included in determining the "ratio of expenditures."

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.[3] See Holmes factors (1) (2), (3), and (4).

[3]Petitioner argues that under Holmes factor (6) (expenditures show that property owner has gone beyond mere contemplated use), only intervenor's expenditures for installing water systems or excavating for utilities could be considered in determining the total or ratio of qualified expenditures, not intervenor's expenditures for preparatory activities such as surveying and septic evaluations. However, we believe Holmes factor (6), like Holmes

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. See Clackamas County v. Holmes, 265 Or at 198-199; Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529 (1985) (expenses incurred toward use, where use had not received all required approvals, could not be counted toward determining existence of a vested right); see also Cook, 50 Or App at 80.

In 1982, the county took an exception to Statewide Planning Goal (Goal) 3 (Agricultural Lands) and Goal 4 (Forest Lands) and zoned part of the exception area RR-2.5. The subject property was within this portion of the exception area. The exception area was acknowledged by LCDC in 1984. In 1986, the Supreme Court in 1000 Friends of Oregon v. LCDC (Curry County), supra, (Curry County), determined the county's exceptions to Goals 3 and 4 were not sufficient to satisfy Goal 14 (Urbanization). In response to the Court's decision in Curry County the county, in 1989, rezoned the subject and other properties from RR-2.5 to RR-5

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factor (5) (extent of nonconformity of the proposed use), is not directed at deciding whether individual expenditures are qualified to be considered in determining the total expenditures, or ratio of those expenditures to the total cost of the proposed development, but rather is a factor to be considered in deciding whether the total qualified expenditures are sufficiently substantial to give rise to a vested right. Thus, in this case, intervenor has satisfied Holmes factor (6) if his qualified expenditures show that his activities furthering the proposed development have gone beyond mere contemplated use.

zoning.

In Curry County the Supreme Court determined that Goal 14 must be complied with before the RR-2.5 zoning for the subject, as well as other, property could be lawfully applied. After the Curry County decision, intervenor is deemed to have notice that the zoning designation on which he relied was invalid (in the absence of a determination that the RR-2.5 zoning designation complies with Goal 14, a determination which the county never made).[4] Therefore, after the Court's 1986 decision in Curry County any expenditures made in contemplation of dividing and developing the subject property, consistent with the existing RR-2.5 zoning, which the Court held was not shown to be in compliance with Goal 14, could not properly be considered in a vested rights equation.[5] Accordingly, the

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[4]Whether intervenor had notice of the Curry County decision affects application of Holmes factors (1), (2) and (3) quoted above. The county's order states intervenor did not actually become aware of the Court's decision in Curry County until 1988. However, we believe that intervenor is charged with constructive notice of the Curry County decision. The date of the Court's decision, and not the date of intervenor's discovery of the Court's decision is controlling. The Curry County decision involved the property at issue in this appeal, as well as other property, and clearly applies.

[5]Of course, if the county determined either that the proposed development or the prior RR-2.5 zoning of the subject property complied with Goal 14, then the county could include in its vested rights calculations those expenditures made by intervenor both before and after the Curry County decision, so long as those expenditures were consistent with the Holmes factors in other respects. However, the county made no such determination here and we, therefore, direct our attention to those expenditures properly considered by the county in a vested rights equation in the absence of a finding of Goal 14 compliance.

county incorrectly included intervenor's expenditures, from 1986 up to the zone change in 1989, in reaching its determination that intervenor's expenditures were substantial.

The next question is what expenditures incurred prior to the Curry County decision are properly considered in determining the existence of a vested right to build three residences on, and divide, the subject property. Petitioner argues that all of intervenor's expenditures incurred prior to the Court's 1986 decision were also incurred prior to the 1984 acknowledgment of the county's RR-2.5 zoning for the subject property (which acknowledgment was reversed by Curry County).[6] Petitioner suggests that under 1000 Friends of Oregon v. LCDC (Linn County), 78 Or App 270, 277, 717 P2d 149 (1986), expenditures may only be considered in a vested rights determination if such expenditures were incurred prior to promulgation of the Goals. We do not read 1000 Friends of Oregon v. LCDC (Linn County), supra, that broadly. The issue in 1000 Friends of Oregon v. LCDC (Linn County) was whether a county plan and land use regulations governing vested rights complied with the statewide planing

[6]The county's order appears to dispute this, in that it states that the expenditures for the "three favorable site evaluations" were incurred in 1984. Record 5. We also note petitioner apparently concedes, and we believe properly so, that expenditures made between the time of acknowledgment and the Curry County decision reversing that acknowledgment, could be considered, if they are otherwise proper expenditures for determining the existence of a vested right.

goals. The Court of Appeals agreed that "whether particular parties enjoy vested rights in particular situations is a matter for case-by-case determination." 1000 Friends of Oregon v. LCDC (Linn County), 78 Or App at 276. However, the Court also stated:

> "However, [the proposition that vested rights are determined on a case-by-case basis] does not have any bearing on whether a local body violates the goals if it defines the tests to be applied in the case-by-case determinations or establishes incorrect tests for the allowance of uses that are contrary to the goals. The issue here is whether the county's plan and regulations comply with the statewide planning goals, and the ordinance's vested rights provisions are as much subject to goal compliance review as any other provisions of the county's land use regulations. * * * It is simply not compatible with Oregon's statewide land use regulatory scheme for a county to be able to legislate, in the guise of a definition of 'vested rights,' whether state regulations can be applied to the use of land within the county's territory." 1000 Friends of Oregon v. LCDC (Linn County), 78 Or App at 276-277.

We do not read 1000 Friends of Oregon v. LCDC (Linn County) to state any general rule that all expenditures relating to development of land in the State of Oregon, made in furtherance of a vested right, must have been made before promulgation of the statewide planning goals. Prior to the Curry County decision, it was not clear that Goal 14 was required to be applied to this property. Indeed, LCDC acknowledged the previous RR-2.5 zoning for the subject

property as being in compliance with the goals.[7]

The circumstances of each particular claim of vested rights must be measured against the Holmes factors. The rule petitioner attributes to 1000 Friends of Oregon v. LCDC (Linn County) is too broad.[8] Accordingly, we conclude that the county must decide whether any of intervenor's expenditures, prior to the Curry County decision are properly considered in determining whether intervenor has a vested right to development of the subject land with three residences.

Specifically, the county must determine what expenditures intervenor made toward division and development of the subject property to establish three residences, prior to the 1986 Curry County decision.[9] Once it is ascertained which expenditures intervenor incurred prior to the 1986 decision, the county must then decide whether any of those identified expenditures are properly considered in a vested

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[7]Most, if not all, of intervenor's pre-1986 expenditures were made under the RR-2.5 zoning which LCDC acknowledged in 1984.

[8]Although we conclude that petitioner reads 1000 Friends of Oregon v. LCDC (Linn County) too broadly, we do not mean to infer that the Goals are irrelevant considerations in determining whether a vested right to develop land exists, absent an appellate court decision (like Curry County) directly affecting the property at issue. We simply reject petitioner's suggestion that intervenor should have known prior to the Curry County decision that development of the kind proposed may violate Goal 14's prohibition against urban development on rural land.

[9]As far as we can tell, the only expenditures made prior to 1986 were the expenditures for the survey in the amount of $2,534.50, and the fee for septic evaluation, in the amount of $275.

rights determination, under the Holmes factors. Additionally, the county adopted no finding regarding total project cost, and it must do so to reach a decision on the expenditure ratio of Holmes factor (7).

In sum, the county has not established which, if any, of intervenor's expenditures incurred prior to 1986 are properly considered in determining a vested right, and has not calculated the ratio of those expenditures to the total cost of the proposed use.[10] Until the county does, it is in no position to apply the Holmes ratio test or to determine whether the qualified expenditures were "substantial" and support a finding that intervenor has acquired a vested right to development. See Union Oil Co. of California v. Clackamas County, 14 Or LUBA at 725.

The second and fourth assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

> "The county failed to comply with the applicable law because it failed to consider whether the present density restrictions would deprive the Respondent of the opportunity to derive a reasonable economic value from his investment."

Petitioners cite Webber v. Clackamas County, 42 Or App 151, 155, 600 P2d 448 (1979) (Webber), for the

[10]In this appeal, we do not know what the proper expenditures are or what the total project cost is. Accordingly, we cannot determine, as a matter of law, that the qualifying expenditures, if any, are so insubstantial as to preclude the existence of a vested right.

proposition that as a prerequisite to determining whether a landowner has a vested right to continue a stated activity, a county must find the landowner will be otherwise deprived of "any opportunity to derive reasonable economic value from [an] investment."

We do not believe Webber requires such a determination. In this regard the Court of Appeals stated:

> "Plaintiffs also bear the burden of proving that density restrictions in the comprehensive plan would deprive them of any opportunity to derive reasonable economic value from their investment. They must show not only that they will lose the anticipated return on their investment, but also that the water system is incompatible with alternative uses. Plaintiffs did not sustain their burden of proof on this question. * * * In sum, plaintiffs have not established a vested right to continue development of a nonconforming use, because their expenditures for construction of the water system do not constitute a major portion of the total cost of the project and because they did not establish an absence of economically reasonable alternative uses for the water system." Webber, 42 Or App at 155-157. (Emphasis supplied.)

The investment to which the Court in Webber was referring, was the expenditure for the water system. In essence, the Court decided the water system was not only referable to the proposed use, but also could serve a variety of other uses. This is a clarification that expenditures must be directly attributable to the use for which there is an alleged vested right. We conclude under our resolution of the second and fourth assignments of error above that the county incorrectly applied the Holmes "ratio

of expenditures" factor. On remand, the county must explain why any qualified expenditures are directly attributable to the proposed use. We do not believe Webber requires the application of any standards in addition to those set forth in the Holmes factors. Cook, 50 Or App at 84.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The county failed to comply with the applicable law. Specifically, it failed to distinguish between a vested right to a land division and a vested right to a nonconforming use, and it failed to consider its own regulations relating to land divisions and nonconforming lot size."

Petitioner argues that the county's decision violates Curry County Zoning Ordinance (CCZO) Section 5.030 which provides:

> "If at the time of passage of this ordinance, a lot, or the aggregate of contiguous lots or land parcels held in a single ownership has an area or dimension which does not meet the lot size requirements of the zone in which the property is located, the lot or the aggregated holdings may [sic] occupied by a use permitted in the zone provided that an urban use is not allowed within a 'rural' or 'resource' zone without a Goal 2 exception to Goal 14."

Petitioner argues that simply because intervenor may have established a vested right to a land division, does not mean intervenor has established a vested right to use those parcels for urban uses in violation of CCZO Section 5.030.

The county's order is unclear in its scope as to whether it determines the existence of a vested right only

to a land division or a vested right to both a land division and construction of residences on the parcels created. However, we believe it is a reasonable interpretation, and one which was clearly intended by the county, reading the order as a whole, that the order determines the latter.[11] Because we interpret the county's order as determining a vested right for both a land division and construction of three residences on the resulting parcels, the above quoted CCZO provision is not applicable, and the county did not err in failing to apply it.

The first assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

> "The county's determination that the respondent had a [sic] established a vested right to partition the subject property is not supported by substantial evidence in the whole record."

No purpose would be served in reviewing the evidentiary support for inadequate findings.

The fifth assignment of error is denied.

The county's decision is remanded.

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[11]We also believe that little purpose would be served by deciding the order simply determines the existence of a vested a right to division of land, and not a vested right to division and development of the subject land with three residences. Remanding this appeal to the county on the assumption that the county only determined the existence of a vested right to a division of the subject land invites multiple appeals on separate determinations of vested rights, involving the same property and the same expenditures. We do not see that such an interpretation is reasonable, in view of the fact that the county made it reasonably clear that it believed it was approving a vested right to both division and development.