BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. CURRY COUNTY, Respondent, and L.C. ASHCRAFT and CATHERINE ASHCRAFT, Intervenors-Respondent.	LUBA No. 90-022 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.

Richard Stark, Medford, filed a response brief and argued on behalf in intervenors. With him on the brief was Stark and Hammack.

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

REVERSED 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 in an RR-10 [Rural Residential, 10 acre minimum] zone under a non-conforming use - vested rights theory." Record 1.

MOTION TO INTERVENE

L.C. Ashcraft and Catherine Ashcraft move to intervene on the side of 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 consists of 1.02 acres of vacant land in Curry County. The property is located near the City of Brookings, but not within the urban growth boundary. It is surrounded on at least two sides by single family residences, and on one side, by land in agricultural use. The property is located a short distance from the Pacific shore.
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> "Although it is not completely clear from the record, it appears that from 1971 to 1982 the property (or at least most of it) was zoned for commercial use. In 1982, the Curry County Comprehensive Plan was revised and in 1983 the property was rezoned Residential-2 (R-2) (12,000 square feet minimum). This zoning was supported by a Goal 3 exception which was acknowledged by LCDC in 1984. In 1986, the Oregon Supreme Court remanded LCDC's acknowledgement of Curry County's Comprehensive Plan on the ground that urban land uses could not be allowed on rural lands without an exception to Goal 14 notwithstanding the existence of exceptions to Goal 3 and Goal 4.

1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986). In response to the remand, the property was rezoned in 1989 to Rural Residential (RR-10) (10 acre minimum).

"The Respondents acquired the majority of the subject property some time before 1965. In 1983, the Respondents purchased an adjoining parcel and combined it with their existing holdings to create a parcel in excess of 60,000 square feet. The Respondents planned to redivide the combined parcels into five separate parcels each in excess of the minimum 12,000 square feet required for residential development in the R-2 zone.

"In September of 1983, the Respondents applied for and received favorable site evaluations for five septic systems. In October of 1983, the Respondents obtained permits for driveways to connect the proposed parcels to an abutting county road (Oceanview Drive). In November 1983, the Respondents received approval for a minor partition which created two of the proposed five parcels. The remaining property is at issue here. In 1987, the Respondents had certain utilities extended to the property.

"The Respondents base their vested rights claim on the following expenditures made between 1965 and 1988:

"(EXPENSES INCURRED DURING AND BEFORE 1983)

"a.	Purchase of 10,000 square foot parcel (1983)	$10,054.00
"b.	Survey costs (1983)	906.00
"c.	County fees and perc tests (1983)	532.50
"d.	Driveway installation (1983)	1,042.18
"e.	Real property taxes (amount paid over Green Belt amount (1965-1983)	1,819.53

"Total $14,354.21

"(EXPENSES INCURRED AFTER 1983)

"a. Underground Utilities (1987) $ 2,445.18

"b. Survey work (April 1988) 125.00

"c. County fees to split tax lot designations (1988) 375.00

"d. Survey work (September 1988) 90.00

"e. Real property taxes (amount paid over Green Belt amount (1983-1989) 642.19

"Costs after 1983 3,644.37

"Costs 1983 and before 14,354.21

"Total land development costs: $18,031.58

"* * * * *

"The Respondents estimate that the total cost (other than land acquisition) to develop their proposed parcels with three houses of 12,000 [sic 1,200] square feet each would be $126,000." (Record citations and footnotes omitted.) Petition for Review 3-6.

There is no dispute that two developable parcels were divided from the parent parcel of the subject property by a 1983 minor partition approval.[1] The dispute in this appeal centers on whether intervenors-respondent's (intervenors') activities concerning the subject property are adequate to

[1]We express no opinion on the legal sufficiency of this assumption.

establish a vested right to divide the subject property into three parcels and develop those parcels with single family residences. The county determined intervenors established a vested right to such division and development, and this appeal followed.

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;
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> "2. The amount of notice of any proposed re-zoning;
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> "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.)[2]

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 applying the Holmes expenditure factors.[3]

One determination necessary to ascertain whether a property owner has incurred substantial expenditures toward

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[2]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).

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

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

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

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, rev den 299 Or 314 (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 R-2. 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 rezoned the subject and other properties from R-2 to RR-10 zoning in 1989.

In Curry County the Supreme Court determined that Goal 14 must be complied with before the R-2 zoning for the subject, as well as other, property could be lawfully applied. After the Curry County decision, intervenors are deemed to have notice that the zoning designation on which

they relied was invalid (in the absence of a determination that the R-2 zoning designation complies with Goal 14, a determination which the county never made).[5] Therefore, any expenditures made in contemplation of dividing and developing the subject property, consistent with the existing R-2 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.[6] Accordingly, the county incorrectly included intervenors' expenditures, from 1986 up to the zone change in 1989, in reaching its determination that intervenors' expenditures were substantial.

The next question is what expenditures incurred prior to the Curry County decision are properly considered in

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[5]Whether intervenors had notice of the Curry County decision affects application of Holmes factors (1), (2) and (3) quoted above. The county's order states intervenors did not actually become aware of the Court's decision in Curry County until 1988. However, we believe that intervenors are charged with constructive notice of the Curry County decision. The date of the Court's decision, and not the date of intervenors' 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.

[6]Of course, if the county determined either that the proposed development or the prior R-2 zoning of the subject property complies with Goal 14, then the county could potentially include in its vested rights calculations all expenditures made by intervenors 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.

determining the existence of a vested right to divide and build three residences on the subject property. Petitioner argues that all of intervenors' expenditures incurred prior to the Court's 1986 decision were also incurred prior to the 1984 acknowledgment of the county's R-2 zoning for the subject property (which acknowledgment was reversed by the Curry County decision).[7] 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) 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 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

[7]We 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 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 R-2 zoning for the subject property, as being in compliance with the goals.[8]

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.[9] Accordingly, we conclude that

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[8]Most, if not all, of intervenors' pre-1986 expenditures were made under the R-2 zoning which LCDC acknowledged in 1984.

[9]Although we conclude that petitioner reads 1000 Friends of Oregon v. LCDC (Linn County) too broadly, we do not mean to suggest that the Goals

the county must decide whether any of intervenors' expenditures prior to the Curry County decision are properly considered in determining whether intervenors have a vested right to development of the subject land with three residences.

The sum of intervenors' expenditures prior to 1986 is $14,354.21. The most significant of these expenditures are the 1983 purchase price for an additional 10,000 square foot parcel to be added to the original parcel ($10,054), and the real property tax "amount paid over Greenbelt amount [through] 1965-1983" ($1,819.53).[10] Intervenors claim these taxes, as well as the purchase price for the additional 10,000 square foot parcel, were properly included by the county in the "ratio of expenditures." Intervenors state the additional 10,000 square foot parcel was purchased for the purpose of making the original parent parcel large enough to be lawfully divided into five lots, under the then existing R-2 zoning.

As in Union Oil Co. of California v. Clackamas County, 14 Or LUBA at 725, there is no finding, or evidence to which

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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 intervenors 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.

[10]As we understand it, the taxes referred to as being in excess of the "green belt" amount are those taxes which were paid on the portion of the assessed valuation for the subject property which was not resource based.

we are cited, which establishes that the price paid for the 10,000 square foot parcel was a "premium" or an otherwise unreasonable price to pay to enlarge the parent parcel for division and development with only two residences, rather than five. Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., 81 Or App at 8 n 3; see Ecklund v. Clackamas County, 36 Or App 33, 81, 583 P2d 567 (1978). Finally, we see nothing about the fact of the purchase of the 10,000 square foot parcel, or the price of that parcel, inherently inconsistent with either development of the parent parcel, or the parcels created in 1983, with two residences, or with utilizing the subject land for some other purpose.[11] We conclude the purchase price for the 10,000 square foot lot, and the taxes paid for the entire parent parcel, should not be included in the qualified expenditures used to determine whether intervenors have a vested right to divide and develop the subject property into three parcels developable with three residences. Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., 81 Or App at 7-8.

Consequently, the only pre-1986 expenditures remaining are the fees for percolation tests in the amount of $532.50, for driveway installation in the amount of $1,042.18 and survey costs in the amount of $906, a total expenditure in

[11]As we noted earlier in this opinion, there is no dispute concerning development of the two parcels created in 1983. See n 1 and associated text.

the amount of $2,480.68. Even if we determined that these $2,480.68 of expenditures were qualified expenditures to consider in determining the existence of a vested right, we would conclude that this amount of expenditures is inadequate to establish a vested right, considering the total development cost. The county's findings state the total cost to develop the proposed parcels is $126,000. Therefore, the ratio between the expenditures ($2,480.68), and the total development cost ($126,000) is, at most, about 1:50. This expenditure total and ratio ("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 to development of the subject parcel with three residences. Union Oil Co. of California v. Clackamas County, 14 Or LUBA at 725 (ratio of 1:47, as a matter of law, is insufficient to establish a vested right).

Intervenors concede in their brief that expenditures incurred after the 1986 Curry County decision cannot be considered in determining whether intervenors have established a vested right to develop the subject property in the manner proposed. However, it is not clear whether intervenors mean to concede that the proposed development necessarily is "urban" in nature and violates Goal 14. To the extent intervenors have not made this concession, we conclude that residential development at a density of three

houses per acre, served by a community water system, is "urban" development, in the sense an exception to Goal 14 would be required to permit such development on rural land. See Curry County, 301 Or at 504-505 (as a matter of law 1/2 acres lots or less served by community water and sewer are considered urban); Shaffer v. Jackson County, ___ Or LUBA ___ (LUBA No. 89-015, July 7, 1989), slip op 6, 33 n 2; Union Oil Co. of California v. Clackamas County, supra.

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."

Petitioner cites Webber v. Clackamas County, 42 Or App 151, 155, 600 P2d 448 (1979) (Webber), for the proposition that as a prerequisite to determining whether a land owner has a vested right to continue a stated activity, a county must find the land owner 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. * * *
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> "* * * * *
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> "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 factors. 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 intervenors may have established a vested right to a land division, does not mean intervenors have 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.[12]

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[12]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

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 respondents had a [sic] established a vested right to partition the subject property is not supported by substantial evidence in the whole record."

There is no point to reviewing the evidentiary support for inadequate findings.

The fifth assignment of error is denied.

The county's decision is reversed.

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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 division and development.