BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOOD RIVER CITIZENS FOR A
LOCAL ECONOMY and BECKY BRUN,
Petitioners,

vs.

CITY OF HOOD RIVER,
Respondent,

and

WAL-MART STORES, INC.,
Intervenor-Respondent.

LUBA No. 2012-003

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Kenneth D. Helm, Beaverton, filed the petition for review and argued on behalf of petitioners.

Daniel Kearns, Portland, filed a joint response brief and argued on behalf of respondent.

Gregory S. Hathaway, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief were E. Michael Connors and Hathaway, Koback, Connors LLP.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 06/21/2012

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal city approval of a site plan review to allow a 30,000 square foot (sf) expansion of an existing Wal-Mart store, in which the city determined that the applicant has a vested right to construct the expansion.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to respond to waiver issues raised in the response brief. There is no opposition to the motion and it is allowed.

FACTS

In 1991, an engineering firm acting on behalf of intervenor-respondent Wal-Mart (intervenor or Wal-Mart) applied to the city for site plan approval of a proposed commercial retail store on property zoned light industrial. At that time the light industrial zone allowed commercial retail stores as an outright permitted use, subject to site plan review. The proposed site plan depicted a large parking lot and a large building the outlines of which were drawn in solid lines, and labeled "(Approx. 72,113 sf)." The site plan depicted loading docks on the east side of the 72,113-sf building. A rectangular area adjacent to the east face of the large building was marked in dashed lines and labeled "(Future Expansion Approx. 30,000 sf"). The parking lot, access, water, stormwater and sewer were proposed to be constructed to accommodate a 102,000 sf facility. The applicant submitted a traffic study that analyzed the traffic impacts of a 102,000 sf retail store and recommended three major transportation improvements based on that size store. The site review application also proposed a separate 5,000 sf building pad for a bank or fast food facility on an adjacent parcel, but this building pad was not depicted on the site plan.

The planning commission approved the site plan in a brief four-page decision, consisting mostly of 20 conditions of approval. Condition of Approval (a) states that "[a]pproval is for an approximate 72,000 square foot retail facility consisting of general

merchandise, to include apparel, cosmetics, sporting goods, auto and gardening supplies only." Record 1704 (underline in original).[1] The conditions of approval do not mention the 30,000 sf expansion area, although it is described as part of the application.

Wal-Mart subsequently obtained a building permit to construct the 72,000 sf store, and completed that construction in 1992, along with the parking and other infrastructure approved or required in the 1991 decision. No building permit was sought for the 30,000 sf expansion, the area of which continued to be used for a loading dock. In 1997, the city amended the light industrial zone to preclude commercial retail uses, rendering the existing 72,000 sf store a nonconforming use.

On February 23, 2011, Wal-Mart applied to the city for site plan approval to modify the design of the existing 72,000 sf building, to construct a 30,000 sf expansion in the

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[1] The 1991 planning commission decision states, in relevant part:

> "Application was made by Westech Engineering to construct a 72,000 square foot retail structure and a 5,000 square foot pad for a bank or fast food facility. Construction will include 641 parking spaces, expansion area of 30,000 square feet, separate truck access and loading area, and landscaping * * *
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> "* * * * *
>
> "The Commission made the decision to approve the site plan based on recognition and compliance with the following conditions of approval:
>
> "a. Approval is for an approximate 72,000 square foot retail facility consisting of general merchandise, to include apparel, cosmetics, sporting goods, auto and gardening supplies only.
>
> "* * * * *
>
> "n. It shall be unlawful for any person to cause or permit the proposed construction alteration, improvement, or use in any manner, except in complete and strict compliance with the approved site plan.
>
> "o.` Representations by the applicant shall be made part of this approval.
>
> "* * * * *
>
> "s. The proposed 5,000 square foot retail pad will require a site plan review by the City Planning Commission prior to development." Record 1701-04.

location depicted with dashed lines on the 1991 site plan, and to make revisions to the parking lot, landscaping, stormwater system, site access and circulation. City staff advised intervenor that approval of the 30,000 sf expansion would require a demonstration that the 1991 site plan approval had approved the 30,000 sf expansion area and that intervenor had a vested right to complete the construction of a 102,000 sf retail store.[2]

The planning commission held a hearing on the application and approved all proposed modifications except construction of the 30,000 sf expansion. The planning commission concluded that the 1991 site plan had approved only the 72,000 sf main building, and the approval did not include the 30,000 sf expansion. Because the expansion required city approval to be lawful, and a vested right must be lawful when initiated, the planning commission rejected intervenor's vested rights claim.

The city council called up the planning commission decision for an on-the record review. The city council conducted a hearing, and on December 27, 2011, issued a decision concluding that the 1991 site plan did approve the 30,000 sf expansion, and that Wal-Mart had established a vested right to construct the 30,000 sf expansion. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the city council erred in concluding that the 1991 planning commission decision approved the 30,000 sf expansion. Petitioners also argue that the city council erred in concluding that the 1991 decision does not preclude sale of groceries at the existing or expanded store.

A. 30,000 sf Future Expansion Area

The city council cited a number of considerations in concluding that the 1991 decision approved the expansion, including language in the initial paragraph of the 1991 decision that can be read to describe the expansion as part of the 72,000 sf facility, the fact

[2] Under the city's current zoning code, no expansion of a nonconforming use is allowed. *See* n 9.

that the applicant proposed and the city accepted transportation and other improvements sized for the built-out 102,000 sf store, and the fact that the 1991 decision did not include a condition requiring site review for the expansion area, unlike the proposed 5,000 sf building pad.[3]

Petitioners argue that the city council misconstrued the 1991 decision, in particular Condition (a), which according to petitioners unambiguously limits the total size of the

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[3] The city council findings state, in relevant part:

> "* * * Based on documentation from the 1991 site plan proceeding * * * the Council finds that the 72,000 sf retail store and all of its then-proposed components, including the 30,000 sf future expansion area, were reviewed and approved. This conclusion stems from the explicit statements by the applicant, the public notice, staff report and the Planning Commission's 1991 decision that the 72,000 sf store proposal consists of, among other things, a 30,000 sf future expansion area. Also, the record shows that the impacts of a 102,000 sf final build-out store were evaluated in the 1991 proceeding, and the Council finds that the conditions attached to the 1991 site plan approval were proportionate to a 102,000 sf store. These conditions include the required transportation improvements to enable the City's transportation system to accommodate the trips generated by the 102,000 sf store. The most significant transportation improvement required by the 1991 site plan approval is the signalization of the Cascade and Rand intersection, which was based on Westech's Traffic Impact Analysis that assessed the impacts of traffic generated by a 102,000 sf retail store. The 1991 site plan decision also approved a parking lot that was significantly larger than what was needed to serve a 72,000 sf store * * *. The stormwater collection and treatment system was sized and constructed in 1992 to serve the impervious surfaces of the fully developed site, and it appears that the water and sanitary sewer facilities were sized to serve either a 72,000 sf or 102,000 sf store. * * * Based on the preponderance of the evidence in the record, the Council concludes that the 1991 Planning Commission reviewed and approved the 30,000 sf future expansion area as part of its decision.
>
> "There are other indications, which add to the preponderance of evidence, on this point. The Council finds it significant that the 1991 decision approves the 'site plan,' which is described at the beginning of the decision as including the 30,000 future expansion area. The minutes of the 1991 Planning Commission meeting show that Commissioner Jones made the motion 'to approve the site plan for Westech Engineering for a 72,000 square foot retail center' subject to the conditions proposed by staff. The motion did not limit approval to just the initial 72,000 sf store and nothing else; it approved the site plan. The City Council interprets this to mean that the larger proposal, characterized as the 72,000 sf store, but which also included the 30,000 sf future expansion, was approved as proposed. The only exception to this general approval of the 1991 site plan is Condition (s) which requires a subsequent site plan application and approval for the 5,000 sf out-pad. The fact that the 1991 decision does not include a comparable condition for the 30,00 sf future expansion is further evidence that the Planning Commission approved the site plan of the future expansion area in 1991." Record 12 (underline in original).

approved retail store to 72,000 sf. Petitioners argue that if the planning commission had intended to approve the 30,000 sf expansion area then Condition (a) would have referred to a 102,000 sf facility. Petitioners also note that the minutes of the 1991 planning commission meeting reflect the motion by Commissioner Jones to "approve the site plan for Westech Engineering for a 72,000 square foot retail center with the listed conditions * * *." Record 138. According to petitioners, nothing in the minutes indicate that the planning commission intended to also approve the 30,000 sf expansion area. As to the initial paragraph of the planning commission decision, which states that "Construction will include * * * [an] expansion area of 30,000 square feet," petitioners argue that that statement is simply a recitation of the contents of the application, not an indication that the planning commission approved the expansion area. Finally, petitioners argue that the city council erred in relying on the fact that the planning commission required, and the applicant constructed, transportation and other improvements sized for a 102,000 sf store. Petitioners contend that the city council failed to appreciate that the planning commission may have simply allowed intervenor to construct oversize facilities in anticipation of a future site plan application to expand the store. Finally, petitioners cite to testimony in the current proceeding from a member of the planning commission in 1991, reciting her recollection that the planning commission intended to limit the store's size to 72,000 sf.

The city council disagreed with petitioners that Condition (a) was intended to limit the store size to 72,000 sf, finding:

> "Condition (a) does not suggest a different conclusion. First, Condition (a) is not written as a size limitation as the opponents suggest. Read as a whole, Condition (a) is not worded as a size restriction or reduction from the 102,000 sf store. Instead, the condition is worded as an affirmative approval of the 72,000 sf 'retail facility,' which the Council has already concluded is a collection of components and design elements that includes the 30,000 sf future expansion area. Second, the Council finds that the structure of the 1991 decision was a general approval with specific conditions applying to specific components of the store. At most, the Council finds that Condition (a) imposes use limitations on the initial 72,000 sf portion of the store and no

> other aspect. Third, Condition (a) appears to be a limitation on uses, not size, and the goods allowed to be sold are described as 'general merchandise' — a category that includes, but is not limited to, the sale of apparel, cosmetics, sporting goods, auto and gardening supplies. Each item in the list of goods allowed to be sold as 'general merchandise' is separated by a comma, and the last item (gardening supplies) has an additional modifier 'only.' Based on the grammatical separation of each item with a comma, except 'auto and gardening supplies' from the word 'only,' the Council interprets the modifier 'only' to apply to auto and gardening supplies. The Council interprets this to mean that the 1991 Planning Commission mean to preclude auto and gardening services, but to allow the sales of auto and gardening supplies only." Record 12-13 (underline in original, footnote omitted).

The city and intervenor argue that the city council's interpretation of Condition (a) and other language in the 1991 planning commission decision is entitled to deference under an extension of the reasoning in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) (LUBA is to affirm a governing body's interpretation of its own ordinance unless LUBA determines that the interpretation is inconsistent with express language of the ordinance or its apparent purpose or policy). Although *Clark* was concerned with an interpretation of a land use regulation, not a prior land use decision, respondents note that in *Perry v. Yamhill County*, 26 Or LUBA 73, 80, *aff'd* 125 Or App 588, 865 P2d 1344 (1993), LUBA concluded that the reasoning in *Clark* extended to an interpretation of a prior land use decision. Subsequently, the legislature adopted ORS 197.829, which codified and modified *Clark* in part.[4] In *Larsson v. City of Lake Oswego*, 26 Or LUBA 515, *aff'd* 127 Or App 647, 651, 874

[4] ORS 197.829 provides:

> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

P2d 99 (1994), both LUBA and the Court of Appeals questioned whether *Perry* was correct in light of the subsequent adoption of ORS 197.829(1), but did not have to resolve that question. Respondents urge LUBA to resolve the question in this appeal, and reconfirm the holding in *Perry* that a local governing body's interpretation of a prior land use decision is entitled to deference under *Clark*. In the alternative, respondents argue that even if deference is not due under *Clark*, LUBA should conclude that the city council correctly interpreted the 1991 planning commission decision as approving the 30,000 sf expansion area.

We continue to question whether *Perry* was correct in extending a deferential standard of review to a governing body's interpretation of a prior land use decision, in light of the subsequently adopted ORS 197.829(1). Because the legislature modified and perhaps limited the holding in *Clark*, it is arguable that the legislature intended ORS 197.829(1) to be a comprehensive statement of the circumstances under which the *Clark* deferential standard of review is applied to a governing body's interpretations, and did not intend LUBA to extend the reasoning in *Clark* to circumstances not covered by the statute. Even if *Perry* was correctly decided, we also question whether *Clark* deference is due to a governing body's interpretation of a prior land use decision that was made by a different body, in the present case, the planning commission. The premise underlying *Clark* is that a governing body has a better understanding of the intended meaning of legislation that the governing body has drafted and adopted, than does a more remote review body like LUBA. That premise is absent when the governing body is interpreting text that the governing body did not draft.

> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

However, as in *Larsson*, we need not resolve the issue in the present case, because we agree with respondents that even under a non-deferential standard of review the city council correctly understood the 1991 planning commission decision to approve the 30,000 sf expansion area.

As the city council findings note, the 1991 planning commission expressly approved the "site plan," which as discussed above depicted the proposed 72,000 sf building and a 30,000 sf future expansion area, but did not depict the 5,000 sf out-building. The initial paragraph of the 1991 decision describes the application as proposing to construct a 72,000 sf building and that "[c]onstruction will include" a 30,000 sf future expansion area, among several other features proposed on the site plan. The city council understood the reference to the "72,000 square foot retail structure" to be shorthand for the several project components proposed on the approved site plan, including the parking lot, expansion area, truck access and loading area, etc, except as specifically conditioned elsewhere in the decision. That is consistent with the operative terms of the decision, which is to "approve the site plan." *See* n 1. Significantly, it is evident that the planning commission did not approve the 5,000 sf out-building, which was not depicted on the site plan, because the planning commission imposed a specific condition requiring that the applicant return for site plan approval of that building. No similar condition was imposed regarding the 30,000 sf expansion area depicted on the approved site plan. If the planning commission intended its decision to reject the proposed 30,000 sf future expansion area depicted on the site plan, or require a separate site plan review, it knew how to express that intent.[5]

[5] The 2011 recollection of the former planning commission member that the 1991 planning commission did not intend to approve the expansion area is not probative legislative history. *David v. City of Hillsboro*, 57 Or LUBA 112, 136 (2008). At best it is some evidence regarding the 1991 planning commission's intent. However, given the intervening 20 years, that recollection is not sufficient to undermine the city council's findings regarding the intent of the 1991 planning commission, based on the text and record of the decision itself.

The foregoing is consistent with the minutes of the 1991 planning commission hearing. The minutes reflect that the proposed development before the planning commission included the 30,000 sf expansion area. Record 703. In its presentation, the applicant's representative stated that a "30,000 square foot expansion is planned for the facility." Record 704. The applicant also stated that there are "no plans pending for the 5,000 square foot pad[.]" *Id*. Subsequently, the planning commission decided to require that the applicant return with a separate site plan application for the 5,000 sf building pad, and a new condition was imposed to that effect. Record 707. In addition, Condition (a) as originally proposed by staff was modified to remove references to the 5,000 sf building pad, and to add the word "only" at the end.[6] Record 721. In contrast, no concerns were raised at the hearing about the 30,000 sf expansion area, and as noted no conditions or limitations were imposed regarding the expansion area. Based on the foregoing, the city council could reasonably conclude that in approving the "site plan," the 1991 planning commission intended to approve all of the project components depicted on the site plan, including the 30,000 sf expansion area.

It is true that, as petitioners emphasize, Condition (a) states that "[a]pproval is for an approximate 72,000 square foot retail facility * * *." Read in isolation, Condition (a) can easily be understood to limit the size of all construction to 72,000 sf, and thus implicitly deny the 30,000 sf expansion depicted on the site plan. However, when Condition (a) is read in

[6] Petitioners do not argue that the underlined word "only" added to Condition (a) in the planning commission decision was intended to express a limit on the *size* of the approved facility. As quoted above and discussed below, the city council found, and petitioners do not appear to dispute, that the modifier "only" added at the end of Condition (a) modifies the immediately preceding phrase, "auto and gardening supplies." Although petitioners do not challenge that conclusion, we question whether it is correct. Nothing in the staff report or planning commission minutes suggests there was any concern raised below regarding provision of goods or services related to automobiles or gardening, or indeed concern regarding any type of merchandise sold at the store. Based on the staff report and minutes, and the evolution of Condition (a), the most likely explanation seems to be that the modifier "only" was added to Condition (a) when the language referring to approval of the 5,000 sf building pad was deleted from the staff-proposed Condition (a), presumably to emphasize that the planning commission had voted *not* to approve the proposed 5,000 sf building pad. We need not speculate further on this point, however, as no party argues that the addition of "only" to Condition (a) has any significance in this appeal.

context with the remainder of the 1991 decision, we conclude that the city council's interpretation of Condition (a) is at least as consistent with all of the text of the 1991 decision as a whole, than is petitioners' preferred interpretation. The city council did not err in interpreting the 1991 decision to approve the 30,000 sf expansion area depicted on the site plan.

B. Sale of Groceries

Wal-Mart apparently plans to expand the existing store in part to provide sufficient room to offer the sale of groceries, which heretofore have not been sold at the existing store. Petitioners argued below that Condition (a) provides an exclusive list of the types of merchandise that can be sold at the store, whether it is the existing or the expanded store.

The city council rejected that argument. As quoted above, the city council interpreted the phrase "consisting of general merchandise, to include apparel, cosmetics, sporting goods, auto and gardening supplies only" to expressly limit only sale of auto and gardening *services*. After the quoted finding, the city council continued:

> "Given this interpretation of Condition (a), the Council also rejects the argument that the 1991 Planning Commission meant to, or somehow did, preclude the sale of groceries. In other words, the Council finds that the list of products in Condition (a) that were allowed to be sold was not intended to be exclusive; although, it is relatively clear that auto repair services were excluded. Finally, given the record that apparently was before the 1991 Planning Commission and the then-applicable site plan criteria, the Council does not see that there was a legal basis upon which the Commission could have prohibited grocery sales in this store. For example, trips generated by groceries are not demonstrably different than those by retail." Record 13.

On appeal, petitioners repeat their argument that the list of merchandise types in Condition (a) is exclusive and, because it does not list groceries, groceries cannot be sold at the store.

The source and rationale for the list of merchandise in Condition (a) is unclear. The apparent source is a general description of the project in the application, which states that the "proposed facility will be a single retail user consisting of general merchandise including

apparel, cosmetics, sporting goods, auto, gardening and a variety of other general merchandise products." Record 725. For reasons that are not clear, that language found its way into the staff-proposed Condition (a), and was ultimately retained in the 1991 planning commission decision. However, the staff report and planning commission minutes include no discussion of the types of merchandise that can be sold and, as far as we can tell, no party raised any concerns during the 1991 proceedings about the type of merchandise that can be sold at the store. As the city council decision notes, a commercial retail use was then an outright permitted use in the light industrial zone, subject only to site review, and the site review criteria did not authorize any limitation on the types of merchandise sold at the store.

Whatever the purpose of the list of merchandise types in Condition (a), the city council correctly concluded that that list is not an *exclusive* list of merchandise types that can be sold at the store. Condition (a) describes the approved facility as "consisting of general merchandise, to include" the listed types of merchandise. "[T]o include" is open-ended and does not necessarily suggest limitation. *See Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 193, 211 P3d 297 (2009) (under principle of *ejusdem generis*, a statute that lists what a parcel "includes" is not an exclusive list, although items not expressly listed are limited by the common characteristics of the listed items). In our view, the fairest reading of that language is that the list illustrates examples of general merchandise that the applicant anticipates will be sold at the store, but does not purport to limit sales to those exact types of merchandise.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that, even assuming that the 1991 planning commission approved the 30,000 sf expansion, any right to commence and complete construction of the expansion area was lost due to abandonment or discontinuance,

once the commercial retail store became a nonconforming use in 1997, due to the applicant's failure to make any effort after 1997 to construct the expansion.[7]

Petitioners argued in relevant part to the city planning commission:

> "The staff report indicates that within a short period of time after the 72,000 square foot retail store was approved, Wal-Mart built and opened the store for business. Typically land use approvals expire within two years if those approvals are not acted upon. Here, Wal-Mart has chosen to wait almost twenty years to act on its alleged right to expand the store. Even if the Planning Commission were to determine that the 30,000 square foot addition was approved in 1991, that approval expired a few years thereafter, and certainly did not survive the rezoning of the subject property in 1997.
>
> "The staff report relates that the subject property was rezoned in 1997, and subsequent to that rezoning the Wal-Mart store became a nonconforming use. The City Council made a decision in 1997 that commercial retail was not appropriate in the Light Industrial zone. Today, the Wal-Mart store is a nonconforming use subject to all of the limitations imposed on nonconforming uses under state law. ORS 215.130 controls nonconforming uses." Record 208.

Petitioners went on to discuss the provisions of ORS 215.130 and a number of cases concerned with discontinuance of nonconforming uses. Record 209; *see* n 12, below. Before the city council, petitioners incorporated their arguments to the planning commission, and argued that "[w]hile the store became nonconforming in 1997, no part of the 30,000 sq. foot expansion area was ever applied for or partially built sufficient to establish a nonconforming use in that space." Record 75.

The city council noted but did not resolve the issue of discontinuance in its decision. The closest it comes is the following footnote:

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[7] Abandonment and discontinuance are similar concepts in non-conforming use parlance; the only significant difference is that abandonment requires evidence of intent to give up the nonconforming use, while discontinuance does not. *Fountain Village Development Co. v. Multnomah Cty.*, 39 Or LUBA 207, 227 (2000), *remanded on other grounds* 176 Or App 213, 31 P3d 458 (2001). The decision and the parties tend to use the terms interchangeably. In this opinion we will use what seems to be the more applicable concept: discontinuance.

> "It has not escaped the Council's notice that Wal-Mart built-out a 72,000 sf store within a year of approval and then waited 19 years to seek completion of the 102,000 sf store. Oregon law places no particular deadline on when a land owner must seek to complete a vested right development. However, this long hiatus raises the question of whether Wal-Mart abandoned its vested right to the full store once it completed the first 72,000 sf. For lack of case law on this point or direct evidence of abandonment in this case, the Council does not reach this issue. At a minimum, the Council concludes that ORS 215.130 does not apply to the City." Record 15, n 4.

On appeal to LUBA, petitioners argue that the city should have addressed and resolved the issue of whether the right to construct the expansion area had been lost through discontinuance, and should have concluded that any vested right had in fact been lost, due to Wal-Mart's failure to take any actions to further construction or completion of the 30,000 sf expansion at any time since the retail use became nonconforming in 1997. Petitioners make three distinct arguments, which we address below.

A. 102,000 sf Building

Petitioners argue that if the 1991 planning commission approved the 30,000 sf future expansion area, it did so as a separate part of a two-part or phased development, not as a single 102,000 sf building. Wal-Mart subsequently obtained building permit approval for the 72,000 sf building, but never sought a building permit at any relevant time for the 30,000 sf expansion. According to petitioners, in order to preserve any right granted under the 1991 site plan decision to construct the expansion area, particularly after the commercial use became nonconforming in 1997, the applicant was required to (1) obtain a building permit and (2) commence at least partial construction of the expansion. *See Twin Rocks Watseco Defense Committee v. Sheets*, 15 Or App 445, 448, 516 P2d 472 (1973) (mere possession of a building permit does not vest the right to commence and complete construction of the approved building after the zoning changes to prohibit the building; a building permit plus substantial action is necessary).

The city council concluded on this point that "Wal-Mart is entitled to claim today a vested right to complete the 102,000 sf store so long as it completed substantial construction

on that store by the time restrictive zoning changed in 1997." Record 13. Because the applicant completed substantial construction (the 72,000 sf store) in 1992, the city council found that intervenor had a potential vested right to construct the 30,000 sf expansion and complete the 102,000 sf store approved in the 1991 decision, if it satisfies the factors set out in *Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973)* (*Holmes*), based on the entire project approved in the site plan. Record 13-14. Thus, the city council decision treats the 1991 decision as approving a single, 102,000 sf building, portions of which may be constructed at different times, but which is a single 102,000 sf development for purposes of applying the vested rights analysis.

Respondents argue that the city correctly concluded that the 1991 decision approves site review for a single 102,000 sf building, and that petitioners cite no authority indicating that the unfinished portion of a single building must be treated as a separate use that must independently qualify under a vested rights analysis, even if the applicant never obtained a building permit for or commenced construction of the 30,000 sf expansion area.

How to apply a vested rights discontinuance analysis to development that is approved with distinct phases or components, some components of which are fully developed, some of which are never started, is less than clear to us. We are aware of no cases directly on point. The closest case may be *Friends of Polk County v. Oliver*, 245 Or App 680, __ P3d __ (2011), a Ballot Measure 49 vested rights case involving a multi-phase development of a 137-acre tract. The landowner had expended $1.9 million on the total project, with $1.6 million allocated for partial construction of the first phase. The applicant submitted evidence of the total cost to construct the first phase, a key consideration under one of the *Holmes* factors, discussed below, but no evidence of what would be constructed in other phases or how much other phases would cost to develop. The Court of Appeals affirmed the circuit court's conclusion that the applicant had demonstrated a vested right to complete the first phase for purposes of the *Holmes* expenditure ratio test, but reversed the circuit court's

conclusion that the applicant had submitted evidence necessary to establish a vested right to complete the remaining phases. The Court seemed to analyze the different phases separately, at least for purposes of the expenditure ratio test in *Holmes*. That suggests, perhaps, that different phases or components of a multi-phase or multi-component project are analyzed separately. If so, the failure to obtain a building permit for the expansion and commence substantial construction may mean that no right to complete the expansion ever vested.

However, even if so, we do not think the building expansion at issue in the present case is accurately viewed as a separate phase or component. The building expansion cannot stand alone without the main building, unlike a multi-phase subdivision or a site plan that approves multiple, separate lot developments or buildings. In this circumstance, we see no error in treating a site plan that approves (1) a building and (2) a future expansion of that same building, as a single building for purposes of conducting a vested rights analysis. Accordingly, we disagree with petitioners that the failure to obtain a building permit for and commence construction of the 30,000 sf expansion necessarily means that the applicant never gained any vested right to pursue construction of the expansion in the first place.

B. HRMC 17.05.010 (1997)

Petitioners next argue that the any vested right to construct the expansion was lost pursuant to City of Hood River Municipal Code (HRMC) 17.05.010 (1997), due to the applicant's failure to complete the 102,000 sf build-out within two years of the date the retail commercial use became a nonconforming use. HRMC 17.05.010 (1997) provided in relevant part:

> "A. A non-conforming use or structure existing as of the effective date of the ordinance codified in this title may be continued but may not be substantially altered or expanded. * * *
>
> "B. If a non-conforming us is discontinued for a period of one (1) year, further use of the property shall conform to this title.
>
> "* * * * *

> "E. Nothing contained in this title shall require any change in the plans, construction, alteration, or designated use of a structure for which a permit has been issued by the city and construction has commenced prior to the adoption of the ordinance codified in this title, *provided the structure, if non-conforming or intended for a non-conforming use, is completed and in use within two (2) years from the time the permit is issued*." (Emphasis added.)

Citing HRMC 17.05.010(E) (1997), petitioners argue that any right Wal-Mart might have had to construct the expansion and complete a single 102,000 sf building expired no later than October 1, 1999, two years after the store became nonconforming.

The city and intervenor respond that petitioners never cited or raised arguments under HRMC 17.05.010(E) (1997) during the proceedings below, and any issue thereunder is waived. ORS 197.763(1); ORS 197.835(3).[8] According to respondents, petitioners' failure to raise any issue under HRMC 17.05.010(E) (1997) below denied the city council the opportunity to address the applicability of that code provision and provide any necessary interpretations.

In the reply brief, petitioners concede that no mention of HRMC 17.05.010(E) (1997) was made below, but argue that the general issue of whether the vested right was lost under the city's code was adequately raised in its above-quoted argument, because at least the applicant understood petitioners to be raising issues under the city's code provisions governing nonconforming uses. In its final written argument to the planning commission, Wal-Mart argued:

> "To the extent the Planning Commission considers the City's nonconforming use provisions set forth in HRMC Chapter 17.05, there is no basis for

[8] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

concluding that Walmart's vested right has been lost. * * * * " Record 171; *see also* n 13, below.

Petitioners argue that the issue of whether Wal-Mart's right to construct the expansion area had been lost after 1997 under the city's code was actively discussed below, and such discussion was sufficient to raise the issue of whether that right expired pursuant to HRMC 17.05.010(E) (1997).

HRMC 17.05.010(E) (1997) appeared to be directed at circumstances, similar to the present one, where an approved project is granted a permit and partially completed but then becomes a nonconforming use. In that circumstance, HRMC 17.05.010(E) (1997) required that the project be completed within two years of the date the permit is issued, and thus operated to provide an express expiration date for certain claims of vested rights. However, HRMC 17.05.010(E) (1997) is no longer in effect and the current city code apparently has no analogue. It is not clear whether and how HRMC 17.05.010(E) (1997) would apply to the present vested rights claim, but we need not address that question, because we agree with respondents that to preserve an issue under the particular terms of a *superseded* ordinance such as HRMC 17.05.010(E) (1997), more was necessary than general arguments that the right to construct the expansion had expired or had been lost through abandonment or discontinuance. Intervenor did not understand petitioners' arguments to invoke HRMC 17.05.010(E) (1997); as discussed below in response to petitioners' arguments intervenor did analyze the city's *current* nonconforming use provisions at HRMC 17.05, but nothing in the current code expressly addresses vested rights or provides for the expiration of vested rights, in the same direct and explicit terms as HRMC 17.05.010(E) (1997).[9] The city council

[9] The current version of HRMC 17.05 provides, in relevant part:

> **"17.05.010 Purpose.**
>
> "The purpose of this chapter is to permit nonconformities to continue, but not to encourage their perpetuation, and to ultimately bring all uses, buildings, and structures (except certain existing residential uses) into conformance with this ordinance and the Comprehensive Plan.

reasonably did not understand petitioners to invoke HRMC 17.05.010(E) (1997), and had no opportunity to address the applicability of that superseded provision and provide any necessary interpretations. We conclude that the issue raised under this sub-assignment of error was not raised below with the specificity required by ORS 197.763(1), and is waived.

C. Discontinuance of a Vested Right

Finally, petitioners argue that the city erred in failing to address their arguments below that any right vested under the 1991 site plan approval to construct the expansion was subsequently lost through abandonment or discontinuance, due to the applicant's failure to continue any development of the expansion after the use became nonconforming in 1997. Petitioners argue that a vested right is essentially a right to complete construction of a partially developed use or structure after that use or structure becomes nonconforming, and use the completed development thereafter as a lawful nonconforming use. Citing *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 31 P3d 458 (2001), petitioners argue that a vested right, as an inchoate nonconforming use, can be lost through abandonment or discontinuance, like any nonconforming use. In *Fountain Village*, the Court

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17.05.020 Nonconforming Use.

"A use that was legally allowed when established, but which is no longer permitted in the zone, in which it is located, may continue so long as it complies with all of the following requirements:

"1. Expansion: A nonconforming use shall not be expanded or moved to occupy a different or greater area of land, building, or structures than the use occupied at the time it became nonconforming.

"2. Discontinuance: If a nonconforming use is discontinued for any reason for more than twelve (12) consecutive months, any subsequent use shall conform to all of the regulations of the subject zone. For the purpose of this ordinance, rental payments, lease payments, or the payment of taxes shall not be alone or together sufficient to constitute continuance of the use."

of Appeals held that a vested right to complete a nonconforming use cannot be afforded greater protection from loss than the actual nonconforming use would enjoy.[10]

The city and intervenor respond that petitioners did not cite to *Fountain Village* below, and any reliance on the principle articulated in that case was waived. In any case, respondents argue, *Fountain Village* interpreted and applied ORS 215.130 and implementing Multnomah County code provisions, neither of which apply to the City of Hood River. According to respondents, most of the cases and authority cited by petitioners below were based on ORS 215.130, a statute that is codified in ORS chapter 215, which does not apply to cities. *City of Mosier v. Hood River Sand*, 206 Or App 292, 310, 136 P3d 1160 (2006).

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[10] The Court in *Fountain Village* ultimately remanded the decision to LUBA to determine under ORS 215.130 and the county's code the appropriate standard to evaluate whether a vested right is abandoned or discontinued. The county's code provided that a nonconforming use right is lost if abandoned or discontinued for any reason for a period of two years. The code also provided that the nonconforming use or structure may be maintained with ordinary care, implementing ORS 215.130(5). As framed in *Fountain Village*, the key unanswered question was whether discontinuance could be avoided by mere maintenance of a partially completed structure within the relevant two-year period, or whether some actual continued construction must occur within that two year period. However, the parties in *Fountain Village* subsequently dismissed the appeal, so LUBA did not have the opportunity to interpret ORS 215.130 or the Multnomah County code provisions to determine the appropriate standard to evaluate when a vested right to complete and use a nonconforming use has been abandoned or discontinued. In a recent case, *Crosley v. Columbia County*, __ Or LUBA __ (LUBA No. 2011-093, April 11, 2012) *review pending* A151317, we had occasion to answer that question. We concluded:

> "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 is converted to a nonconforming use, or, put another way, the nonconforming use is fully established. Since the use that a vested right protects is an inchoate nonconforming use, *i.e.* a use that does not yet exist, there is no nonconforming use to "maintain." It is the continued 'construction' of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than one year in Columbia County under [the county code] to avoid losing a vested right to continue construction of that vested right. If petitioner discontinued or interrupted construction of the dwelling for more than one year after the construction of the foundation was completed in 1979, the fact that petitioner may have engaged in some activities that can be characterized as maintaining the foundation or maintaining or enhancing the vegetation on the property does not alter the fact that construction was discontinued or interrupted. Where construction of a residence has been discontinued or interrupted, actions to maintain the partially constructed residence are not sufficient to continue 'construction' of the residence." *Slip op* at 11-12.

Respondents contend that in the above-quoted footnote the city council correctly concluded that ORS 215.130 does not apply to the city.

Although petitioners did not cite *Fountain Village* below, they clearly raised the issue of whether the vested right to complete a nonconforming use is lost through abandonment or discontinuance, based on the landowner's lack of effort to continue steps toward completion for some period of time after the use becomes nonconforming. That issue is essentially identical to the issue presented in *Fountain Village*. In the above-quoted footnote, the city recognized the issue of discontinuance as a potential problem for Wal-Mart's vested rights application, but expressly declined to address or resolve that issue. The only matter resolved in the footnote is that ORS 215.130, the statute governing nonconforming uses applicable to counties, does not apply to the city. In our view, however, the city's (correct) conclusion that ORS 215.130 does not apply to the city is at best a partial resolution of the issue of discontinuance that, we believe, petitioners fairly raised below.

Intervenor's vested rights theory and the city's vested rights analysis are both entirely based on *Clackamas County v. Holmes* and its progeny. *Holmes* is a 1973 Oregon Supreme Court case that does not mention ORS 215.130, and which essentially created a vested rights doctrine in Oregon out of a common law foundation. As the discussion in *Fountain Village* demonstrates, for many years after *Holmes* there was considerable uncertainty over the relationship between the vested rights doctrine and nonconforming use principles in general. While *Fountain Village* established that there *is* a strong relationship between vested rights and nonconforming uses, it seems reasonably clear that the vested rights doctrine is a common law doctrine that operates consistently with, but is not based upon, ORS 215.130. Recent legislation appears to reflect the view that common law vested rights are independent of ORS 215.130. Section 5(3) of Ballot Measure 49, which in specified circumstances grants to landowners rights to develop property in ways prohibited by current law, recognizes in certain claimants a "common law vested right * * * to complete and continue the use[.]"

We note that the subsequent cases addressing the "common law vested right" recognized in Section 5(3) have not applied or relied upon ORS 215.130, but have generally applied *Holmes* and its progeny. In short, the vested rights doctrine that the applicant and the city relied upon to approve the expansion at issue in the present case is a common law doctrine, at least somewhat independent of ORS 215.130. Therefore, the city's observation in the above-quoted footnote that ORS 215.130 does not apply to the city does not entirely dispose of the issues fairly raised by petitioners below.[11]

While it is a close question, we believe petitioners raised below with sufficient specificity the issue of whether the vested right to complete the expansion was lost through discontinuance, based on intervenors' failure to make any effort to construct the expansion for a number of years after 1997. Petitioners made that precise argument below, in so many words, citing as authority for that argument ORS 215.130 and a number of cases dealing with discontinuance of a nonconforming use.[12] Under ORS 197.763(1) and ORS 197.835(3),

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[11] ORS 195.310(7) provides that uses authorized under other provisions of Measure 49 have "the legal status of a lawful nonconforming use in the same manner as provided by ORS 215.130[,]" and such a use "may be continued lawfully in the same manner as provided in ORS 215.130." Measure 49 applies to both cities and counties. Notwithstanding that ORS 215.130 usually would not apply to cities, it appears that a nonconforming use that a city authorizes under ORS 195.312 *is* subject to ORS 215.130.

[12] Petitioners argued:

> "Wal-Mart's failure to act on the alleged approval after the 1997 rezoning limits any future use of the nonconforming structure to the rights it obtained under ORS 215.130 in 1997. There is abundant case law on the issue of when a nonconforming use is lost due to discontinuance or interruption. In *Tigard Sand and Gravel v. Clackamas County*, 149 Or App 417 (1997), a quarry owner had diminished aggregate production and stockpiling of rock to almost no sales and very little physical activity on the site. The Court held that the nonconforming use status was lost. Similarly, incidental and sporadic use over time is not enough to establish a nonconforming use. *Clackamas County v. Portland City Temple*, 13 Or App 459 (1973). Even where some nonconforming use remains, nonuse can reduce the scope of permitted use to virtually nothing. *Warner v. Clackamas County*, 111 Or App 11, 13 (1992), *Hendgen v. Clackamas County*, 115 Or App 117 (1992). In *Cory v. Clackamas County*, __ Or LUBA __ (LUBA No. 2002-181, June 18, 2003), a wrecking and scrap metal business closed and all of its inventory of scrapped automobiles was hauled away gates to the subject property were closed and locked for more than a year. While LUBA agreed that the wrecking business was intermittent and infrequent, the fact that the business closed and the inventory was removed showed a discontinuance of the nonconforming use.

issues must be raised with sufficient specificity to give the local decision maker and the other parties a fair opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). An issue is waived if it is not sufficiently raised to enable a reasonable decision maker to understand the nature of the issue. *Craven v. Jackson County*, 29 Or LUBA 125, 132, *aff'd* 135 Or App 250, 898 P2d 809 (1995). Here, the city clearly understood the nature of the discontinuance issue raised by petitioners, as evidenced by the footnote at Record 15. However, the city declined to resolve the discontinuance issue, or at best partially resolved it based on petitioners' citation to ORS 215.130. However, as petitioners point out, at least Wal-Mart recognized that petitioners' discontinuance argument may not be limited to reliance on ORS 215.130. Wal-Mart argued in response to petitioners' argument that the right to construct the expansion had been discontinued by contending that its actions before and after 1997 were sufficient to avoid discontinuance, under the city's current nonconforming use code provisions.[13]

> "Applying ORS 215.130 to the current application demonstrates that Wal-Mart never pursued its alleged right to build the expansion area, any nonconforming use status it might have had was abandoned or reduced in scope to such a degree as to only be preserved in the store building as it existed in 1997." Record 209.

[13] Wal-Mart argued:

> "**Wal-Mart's Vested Right is Still Valid and Has Not Been Discontinued**
>
> "The opponents erroneously claim that Walmart's vested right has been abandoned because Walmart failed to complete the 30,000 square foot expansion within some undefined time period after the City adopted Ordinance No. 1774 in 1997. The opponents rely on the state nonconforming use provision in ORS 215.130 and cases interpreting that statute to supports its position.
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> "The most significant problem with the opponents' argument is that ORS 215.130 does not apply to cities such as the City of Hood River. * * * Therefore neither ORS 215.130 nor the cases interpreting that statute apply in this case.
>
> "To the extent the Planning Commission considers the City's nonconforming use provisions set forth in HRMC Chapter 17.05, there is no basis for concluding that Walmart's vested right has been lost. HRMC 17.05.020(2) provides that 'If a nonconforming use is *discontinued* for any reason for more than twelve (12) consecutive months, any subsequent use shall conform to all of the regulations of the subject zone.' (Emphasis added). The key term is

In our view, the discontinuance issue was adequately framed below, notwithstanding petitioners' citation to ORS 215.130, and a reasonable decision maker would have not only recognized the issue (as the city did), but would have adopted responsive findings addressing whether Wal-Mart's vested right had been lost through discontinuance. Instead, as explained, the city council expressly declined to address or resolve the discontinuance issue. The only relevant matter the city resolved was to observe (correctly) that ORS 215.130 does not apply to the city. But that only begs the question: what authority *does* govern the question of discontinuance of the vested right claimed by Wal-Mart in the present case? To evaluate Wal-Mart's claim for a vested right, the city relied exclusively upon the common law vested right created by *Holmes* and its progeny. *Fountain Village* and *Crosley* are part of the *Holmes* lineage. Indeed, *Holmes* itself dealt with issues of abandonment and discontinuance.[14] Thus, discontinuance is potentially an issue under any application of the *Holmes* common law vested rights doctrine, even if no other legislation applies. As a

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> 'discontinued,' not abandonment as the opponents suggest. The HRMC does not define the term discontinuance, but [dictionary definitions] indicate that discontinuance requires some affirmative act of stopping something that has been taking place. In this case, it would include some affirmative action that is inconsistent with a property owner's reasonable effort to cease the nonconforming use.
>
> "Walmart has clearly not discontinued its vested right to construct the 30,000 square foot expansion. It has continuously operated the existing store since it opened in 1992, and in anticipation of the ability to expand the store consistent with the approved site plan. In fact, Walmart has expended significant effort towards preserving its vested right to expand the existing store by building the existing store with its accompanying infrastructure. In other words, all of Wal-Mart's 'affirmative action' has been directed toward preserving the right to expand the existing store, rather than discontinuing it." Record 170-71.

[14] In *Holmes*, the Court addressed an argument that the vested right had been abandoned after the zoning ordinance was adopted:

> "The plaintiff advances the further argument that the defendants abandoned their projected use of the property by their inactivity from March, 1966, when the zoning ordinance was enacted, to 1970, when defendants started to pour the footings for the plant and were stopped by the plaintiff. We disagree. Defendants, upon the advice of some member of the planning commission, applied for a zone change and did so unsuccessfully on two different occasions during that period. The only reason they placed cattle on the property was to be able to make some economical use of it. Otherwise, the land would have been completely idle." 265 Or at 201.

refinement of that doctrine, *Fountain Village* and *Crosley* indicate that if the local government has adopted legislation governing discontinuance of a nonconforming use, that legislation will also apply to discontinuance of a vested right. In the present case, as Wal-Mart noted below, the city has adopted legislation, at HRMC 17.05, which provides that a nonconforming use is lost if discontinued for any reason for more than 12 consecutive months.

Remand is necessary for the city to address the discontinuance issue fairly raised below, and adopt findings, presumably based on HRMC 17.05, that determine in the first instance whether Wal-Mart's vested right was lost through discontinuance.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In *Holmes*, the Supreme Court held that whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development is based on several factors, including (1) the ratio of prior expenditures to the total cost of the project, (2) good faith of the landowner, and (3) whether the expenditures/improvements have use only for the completed project or could apply to other uses of the land. 265 Or at 198-99. As the final step of its vested rights analysis, the city council considered the factors described in *Holmes*, and concluded that, based on the development of the 72,000 sf store and associated infrastructure in 1992, intervenor had demonstrated a vested right to construct the 30,000 sf expansion. In the third assignment of error, petitioners challenge those findings.[15]

[15] Because we remand under the second assignment of error for the city to address whether any vested right has been discontinued, it may not be strictly necessary to reach the merits of the third assignment of error. However, the issues are fully briefed and, given the close questions presented, we deem it appropriate to resolve the issues presented in the third assignment of error.

A. Ratio Test

Petitioners argue that the city erred in determining the expenditure to total project cost ratio based on a ratio of square footage, rather than as a ratio of expenditures to costs in dollar figures, as *Holmes* and its progeny require.[16] According to petitioners, the applicant declined to provide any construction or project costs for either the 72,000 sf store or the 30,000 sf expansion area, and instead argued that the city could rely on the ratio of square footage between the store and expansion area, expressed as a percentage (70 percent), to conclude that the *Holmes* ratio test is satisfied. The city agreed with that position. However,

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[16] The city council's findings state, in relevant part:

> "The original 1991 approval included an approximately 102,00 sf Walmart store. As part of this approval, approximately 72,000 sf was intended for the initial store construction, and approximately 30,000 sf was intended for future, full build-out. Walmart constructed the initial 72,000 sf store which is more than 70% of the total building improvements. Even though Walmart has not submitted information about the amount of money invested in construction to date, the amount of construction completed is sufficient to estimate approximate and relative cost figures. Even if Walmart had provided expenditure information, that data would be in 1992 dollars spent to construct the existing 72,000 sf store and the 2012 dollars needed to complete the 102,000 sf project. The added adjustment to make the two expenditures comparable would further complicate the calculation. Instead, the Council finds that, absent actual cost data, the square footage completed by 1997 as compared to area of the final full build-out store, is a suitable index of the expenditure ratio required by this factor, which shows that Walmart had completed approximately 70% by 1997.
>
> "* * * Additionally, Walmart asserts and the Council agrees that the infrastructure constructed to serve the current store was sized to serve the final 102,000 sf store. This has the effect of putting the total level of expenditure for the current store in excess of the 70% of the cost of completing the full build-out store. The Council finds that these infrastructure expenditures incurred specifically to accommodate the anticipated full buildout of the store and include an over-sized parking lot and a commensurately sized stormwater collection and treatment system. The Council further finds that the legal obligation that Walmart signalize the intersection at Cascade and Rand was imposed through Condition (f) in the 1991 decision, which was not appealed or contested by the then applicant. This is significant because the cost of this transportation improvement is large; it is predicted on traffic generated by the full build-out 102,000 sf store; it became legally binding in 1991 and remains so today.
>
> "* * * * *
>
> "* * * This amount of construction provides a reliable ratio of the dollar value of prior expenditures to expenditures remaining to complete full build-out, sufficient to convince the Council that Walmart has substantially completed the full store. On that basis, the Council finds the first *Holmes* factor is met." Record 14-15.

petitioners argue that a number of recent vested rights decisions by the Court of Appeals in the context of Measure 49 make it clear that the *Holmes* ratio test requires evidence of actual expenditures (the numerator), as well as evidence of the cost of the total project (the denominator). *Friends of Polk County v. Oliver*, 245 Or App 680, __ P3d __ (2011); *Biggerstaff v. Board of County Commissioners*, 240 Or App 46, 245 P3d 688 (2010); *Kleikamp v. Board of County Commissioners*, 240 Or App 57, 246 P3d 56 (2010).

Respondents argue that the city reasonably relied on a percentage of square footage or construction rather than require evidence of actual expenditures or total project cost expressed in dollars. According to respondents, *Holmes* suggests that a ratio in excess of one to 14, or seven percent, between expenditures and total project is sufficient to satisfy the expenditure ratio test. *Holmes*, 265 Or at 196; *Cook v. Clackamas County*, 50 Or App 75, 81-82, 622 P3d 1107 (1981). Respondents argue that it is undisputed that the applicant constructed 70 percent of the square footage of the total build-out, and 100 percent of the infrastructure for a 102,000 sf store, and because those percentages far exceed a seven percent ratio, that evidence is more than sufficient to demonstrate that the *Holmes* expenditure ratio factor is met. Further, respondents argue, *Holmes* itself suggests that the expenditure ratio test need not be expressed in dollar amounts. In *Holmes*, the Court stated that in order to acquire a vested right to complete construction, "the commencement of the construction must have been substantial, *or* substantial costs toward completion of the job must have been incurred." *Id*. at 197 (emphasis added). Even if evidence of expenditures and total project costs are necessary, respondents contend, in the present circumstance the percentage of construction is a reasonable substitute for a ratio of expenditures to total project cost expressed in dollars.

We agree with respondents that in the present case neither *Holmes* nor its progeny require evidence of actual expenditures compared to the cost of the total project. In *Friends of Polk County,* the nature, scope and cost of the entire project was unknown, and the Court

accordingly reversed. In the present case, the nature and scope of the entire project is well known: a 102,000 sf store consisting of the existing 72,000 sf store plus a 30,000 sf expansion depicted on the site plan. In *Biggerstaff* and *Kleikamp*, the county failed to give any consideration to the magnitude of the costs or effort to complete the project, compared to the actual expenditures. Here, the city council compared the magnitude of the actual construction to date against the construction needed to complete the 102,000 sf store. Because it is undisputed that the percentage of actual construction of the existing store and infrastructure is significantly greater than the percentage of construction needed to complete the 102,000 sf store, by any conceivable parameter, we agree with respondents that the failure to present evidence of the actual expenditures in dollars and the total project costs in dollars does not require remand.

B. Relationship and Adaptability of Expenditures

Holmes requires the city to consider the relationship of expenditures to the completed project and whether improvements constructed could apply to other uses of the land. The city concluded that in 1992 Wal-Mart completed or became legally obligated to complete infrastructure, including oversize facilities for water, stormwater, sanitary sewer, parking, and transportation improvements, predicated on a 102,000 sf store. The city found that those expenditures were related to the completed project and the oversize facilities can practically be used only for the completed 102,000 sf store.

Petitioners dispute that finding, arguing that the oversize infrastructure has served the existing 72,000 sf store for decades, and those improvements do not irrevocably commit the property for the completed project. As respondents note, petitioners' arguments under this *Holmes* factor are based on dicta in *Webber v. Clackamas County*, 42 Or App 151, 600 P2d 448 (1979), which the Court of Appeals subsequently disavowed. *Cook v. Clackamas County*, 50 Or App at 84. Under *Cook*, the vested right applicant is not required to demonstrate that the improvements irrevocably commit the property to the nonconforming

use. The oversize facilities in the present case clearly have a relationship with the completed project, and petitioners identify no lawful use for the oversized aspects of those facilities other than for the completed project. We agree with respondents that petitioners have not identified error in the city's findings under this *Holmes* factor.

C. Good Faith

Another *Holmes* factor is consideration of whether the landowner acted in good faith in making the expenditures prior to the change in zoning. The city concluded that Wal-Mart's expenditures prior to the 1997 rezoning were made in good faith, because Wal-Mart had no knowledge and could not have anticipated that the city would amend the Light Industrial zone to prohibit retail commercial uses.

Petitioners contend that Wal-Mart's lack of effort to complete the 30,000 sf expansion after 1997 constitutes bad faith. However, petitioners cite no authority suggesting that the *Holmes* good faith factor is based on actions, or lack of actions in the present case, taken after the property becomes non-conforming. The good faith *Holmes* factor is intended to discourage a landowner from racing to establish the basis for a non-conforming use, after the landowner receives notice of the change in zoning. That concern is not implicated by Wal-Mart's failure to take steps to complete the store after it became non-conforming in 1997.

The third assignment of error is denied.

The city's decision is remanded.