

Hannah Elliott

From: Hannah Elliott
Sent: Wednesday, September 1, 2021 8:10 AM
To: Hannah Elliott
Subject: FW: Bartels - VR Legal Analysis
Attachments: Bartels - VR analysis.pdf



CROOK COUNTY
AUG 31 2021
PLANNING DEPT

From: Lisa Andrach <lisa@fitchandneary.com>
Sent: Tuesday, August 31, 2021 12:09 PM
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Subject: Bartels - VR Legal Analysis

Please find the attached legal analysis of a vested right determination for the commissioners consideration.
Thank you.

Lisa Andrach, Attorney



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VESTED RIGHTS

LEGAL ANALYSIS IN SUPPORT OF APPLICATION

APPLICANT: Richard Bartels

Original County Decision: C-CU-2229-04

Planning Commission Hearing: September 8, 2021

Dear Commissioners:

The applicant submits the following legal analysis of a vested right as it applies to this application in preparation for the hearing before the Planning Commission on September 8, 2021.

The applicant has applied for a vested right determination concerning the efforts that he has undertaken, and the expenses that he has incurred, in furtherance of the development approved in C-CU-2229-04, to wit: a minimart and gas station.

A. Procedural Process:

A vested right is not a land use decision subject to land use code and applicable criteria. Rather it is a creature of common law derived from case law to determine, simply put, when it would be unfair and inequitable to prohibit the applicant from continuing with and completing the development that he has started following the County's permit approval.

Because the decision is not a land use decision, the County's decision herein is subject to judicial review via a *petition for writ of review* to the Circuit Court of Crook County for review under the legal question as to whether the evidence is sufficient to support the decision and whether the County misconstrued the applicable law. From there, any appeal goes to the Oregon appellate courts.

B. Summary of the Judicial Background Concerning Common Law Vested Rights

Some of you may recall the plethora of cases that passed through the County during the Measure 49/Measure 37 era. During that time, the decisions concerning vested rights were made by the Planning Director with appeal taken to the County Court for review. Looking back I do not recall any of those vested rights applications passing through the Planning Commission so I have provided a brief summary of that flurry of vested rights review for you.

For background, Measure 49 replaced Measure 37. The new law provided Measure 37 claimants with 3 paths to obtain "just compensation" for the termination of their Measure 37 waiver orders. One of the paths under Measure 49 was for the Measure 37 claimant to obtain approval from the

County that they had acquired a vested right to continue the development that had been approved. The other 2 paths gave them the right to much smaller development options.

The numerous cases that flooded the courts concerning vested right status gave the courts a chance to elaborate on the factors to be considered in determining a vested right. The factors to consider were first enumerated in *Clackamas County v. Holmes*, 265 Or. 193, 508 P.2d 190 (1973). There wasn't much subsequent legal guidance following *Holmes* until Measure 49 caused a plethora of litigation. In *Holmes*, the Supreme Court enumerated several factors to take into consideration to determine a vested right – noting that no one factor is controlling. The factors which should be taken into consideration are:

1. The good faith of the landowner,
2. Whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements,
3. The type of expenditures – *i.e.*, whether the expenditures have any relation to the completed project or could apply to various other uses of the land,
4. The kind of project, the location and ultimate cost.
5. Whether the acts of the landowner rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

Holmes, at 198-99.

Not all of the *Holmes* factors may not apply in a given case, and the extent to which the factors do apply will presumably vary with the circumstances of each case. *Friends of Yamhill County v. Board of Commissioners*, 351 Or. 219, 242-43, 264 P.3d 1265 (2011)(*Friends II*). During the Measure 49 era, there was substantial emphasis being placed on the factor considering the ratio of expenses incurred to the total cost of the project because that factor provides an objective measure of how far the landowner has proceeded towards completion of construction (#4), but the *Friends II* court held that the emphasis placed on that factor was in error. Therefore, all of the applicable factors should be weighed appropriately in making the decision.

C. Legal Analysis of the Enumerated Factors

Turning to the factors, the applicant submits that he has acquired a vested right to complete the development:

1. Good Faith

The applicant has at all times proceeded in good faith toward development. Mr. Bartels obtained approval from the County in 2004 and immediately commenced work on the project. As a result of the economic downturn in 2008, the project was slowed, and in some respects delayed. Now more recently the worldwide pandemic concerning COVID-19 has affected his ability to obtain

material and supplies, and the costs of materials and supplies has substantially increased due to factory closures and production deficits worldwide.

In order to start operations on-site, he has invested time and money in establishing a drive-thru coffee shop that also provides limited convenience supplies. He has developed a well, septic, and installed the requisite utilities. He has made the access and parking improvements required. He has leveled the land and prepared a compacted base for the store to the specifications necessary to pour the concrete. The store structure is purchased and on-site and he even pulled the requisite building permit. He has installed the required culverts and made the necessary preparation for the turn lane from Juniper Canyon Road.

The arial photographs from Google Earth show the nature and extent of the on-the-ground improvements. In all respects, the applicant has proceeded in good faith notwithstanding the outside forces that have negatively impacted the development schedule.

2. Notice of Change in Law: Whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements

This is one of the factors that does not apply to the review of this application. The vested right application is before you because the applicant's approval and subsequent extensions have expired. Applicant submits that even with the expiration of the approvals he had satisfied all of the conditions of approval prior to expiration of the permit and therefore the need to obtain a vested right may be moot. However, because he was directed to either reapply for the conditional use permit or submit a vested right application, he has followed that directive from the Community Development Department.

3. The type of expenditures – *i.e.*, whether the expenditures have any relation to the competed project or could apply to various other uses of the land,

There are very few expenditures that could apply to various other uses of the land. Arguably, only the leveling of the land, the septic, and the well, may apply to other uses of the land – if there were any other uses that could be approved for the land. The property is zoned RRM-5, and the uses of the land must be principally related to residential and/or recreation. Accordingly, there are few uses that could be approved for which the well, septic, and utilities would be applicable.

In this case, the majority of the expenditures relate only to this project. The expenditures are enumerated in the other written materials and exhibits in the record. The architectural drawings, store building/structure and the related surface preparation of the base, turning lane on Juniper Canyon Road preparation, culvert improvements, commercial access improvements, parking areas, drive thru espresso and mini-convenience store, are all directly related to this project. The utilities already installed or for which the conduit and other preparations have been made exceed what would be necessary for a dwelling. There are several other expenditures that relate only to

this commercial use as a minimart and gas station. None of these expenditures would be necessary for a single-family dwelling.

4. The kind of project, the location and ultimate cost.

To determine the ratio of investment toward the total project cost, the county must find two historical facts: (1) the cost that the applicant incurred to construct the project and (2) the estimated cost of the project. *Oregon Shores Conservation Coalition v. Board of Comm'rs of Clatsop County*, 297 Or.App. 269, 276 (2019)

The applicant has been working toward developing the property for a minimart and gas station near the Prineville Reservoir. This commercial project has several components to it, all of which have required specific improvements related thereto. Here, there are few expenditures remaining to finish the project. At the time of approval, the applicant calculated that the entire project cost would be approximately \$400,000-\$500,000.

The applicant has been working with Ed Staubs & Sons to secure the above ground gas tanks and to have them placed on-site. The estimate for those tanks is \$20,000 each with a not to exceed \$30,000 cost. Applicant only needs 3 tanks.

Due to the current material and supply shortages, the cost of material and supplies has recently increased. While awaiting a course correction in the market, the applicant is able to construct the store building that is on-site and do other improvements. The market has started to correct itself, but there it is still inflated. Hopefully within a year costs are closer to the pre-pandemic rates, which would again put the total project cost closer to \$400,000-\$500,000.

Applicant has invested approximately \$300,000 into this project. That is a substantial investment as it is a substantial sum of money. Looking at the ratio analysis, this investment equates to investment of at least 72% of the original \$400,000 estimated project cost.

Other vested rights cases have found as little as 3% to 10% enough based upon the analysis of all of the factors. In *DLCD v. Crook County (Hudspeth)*, 242 Or.App. 580 (2011), the Crook County Planning Director had determined that the 9.8% ratio was sufficient to find a vested right.

Like the *Friends II* court emphasized, the weight given to the expenditure may vary depending on the ultimate cost. The Court gave the example that \$200 invested towards a \$1,000 project may not be considered a substantial investment by many, however, “when the ultimate project cost runs into millions of dollars, an expenditure may be substantial even though it is only a small percentage of the projected cost.” See *Johnson v. Deschutes County ex rel. Board. of County Com'rs*, 249 Or.App. 60, 67-68 (2012).

Here, the sum of \$300,000 and the ratio of 72% are both substantial in support of this application.

5. Whether the acts of the landowner rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

All of the evidence demonstrates that the applicant's efforts rise beyond mere contemplation of the use. He has done more than just level an area of the property and remove brush. He has done more than dig test holes or interview contractors and architects. He has actually retained the professional services of architects and surveyors. He has made road improvements. Installed a septic and had a well installed. He has commenced operation via a drive-thru mini convenience market and coffee stand. He had the store purchased and delivered on-site and obtained the building permit for it. He has prepared the base for the store to the requisite compaction standards for concrete and installed the utility supply lines and conduit as needed within that base. Electricity has been brought to the site. A fire suppression tank has been installed because the fire station was not located down the road at the time of the land use approval that required the tank. The evidence makes clear that he has gone beyond kicking an idea and some dirt around and pulling a few weeds. He has clearly invested substantial money, time, and equipment toward this development.

D. Conclusion

Based upon the analysis of the factors, it is clear that this is a case where the applicant has gone well beyond their minimum necessary to acquire a vested right to complete the development. I have been involved in more than a dozen vested rights cases both at the local level and briefed and argued them up through the circuit and appellate courts, in a number of jurisdictions. In all of the applications that I have argued, this is one of the clearest case that I have ever seen.

Not only does the applicant easily exceed the 10% ratio of investment, he has a substantial sum invested toward the project - \$300,000. He also has done more on-the-ground improvements than most of the cases that Crook County approved under Measure 49.

Based upon the foregoing, the applicant has satisfied the *Holmes* criteria, and according to the principles of fairness and equity as defined by *Holmes* and its progeny, the applicant should be allowed to finish the project that he has partially completed. *Oregon Shores Conservation Coalition v. Board of Comm'rs of Clatsop County*, 297 Or.App. 269, 276 (2019) In sum, the evidence supports that he has acquired a vested right to complete this project.

Respectfully submitted,

Lisa Andrach

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