

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DIANA V. GARDENER and  
JUDSON M. PARSONS,

Plaintiffs-Appellants,

v.

MARION COUNTY BOARD OF  
COUNTY COMMISSIONERS,

Defendant-Respondent,

and

LENA PAGE, as Trustee of the  
Lena Page Living Trust,

Intervenor-Respondent.

Marion County Circuit Court  
Case No. 06C 14580

Appellate Court No. A135077

*AMICUS CURIAE* FOR OREGON CHAPTER OF THE AMERICAN PLANNING  
ASSOCIATION AND THE AMERICAN PLANNING ASSOCIATION'S  
SUPPLEMENTAL BRIEF REGARDING COMMON LAW VESTED RIGHTS

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November 2008

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## I. INTRODUCTION

The Oregon Chapter of the American Planning Association and its parent national organization, the American Planning Association, (collectively "APA"), provide this supplemental briefing on whether Intervenor-Respondent ("Page") possesses a "common law vested right \*\*\* to complete and continue the use described in the [Measure 37] waiver." 2007 Ballot Measure 49, Oregon Laws 2007, ch. 424, § 5.

APA agrees with the argument and analysis set forth in Plaintiffs-Appellants' Supplemental Brief. Rather than restate those conclusions here, APA would also like to add a number of additional comments regarding the applicability of vested rights to this particular application as well as identify some limits to this court's substantive review of this request.

## II. ARGUMENT

Section 5 of Measure 49 affords three alternative options to development under Measure 49. The first two allow a claimant to pursue limited residential development through the conversion of an existing claim under *former* Measure 37 consistent with the development regulations prescribed in Measure 49; however, the third option allows for development:

"To the extent the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of the 2007 Act to complete and continue the use described in the waiver."

Evaluating the scope of common law vested rights requires a factual inquiry to determine whether a landowner or developer has sufficiently changed position in reliance on a government approval so that it is unfair to allow the government to enforce new land use legislation against them. Given the highly factual nature of the inquiry, this court lacks authority under ORS 197.850 to evaluate this question in the first instance.

*Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973), is considered the primary vested rights case in Oregon and it provides four factors for a court to consider in making that a vested rights determination. Those factors include:

1. The ratio of the expenses incurred by the developer to the total cost of the completed project.
2. The type of expenditures; specifically, whether the expenditures have a relationship to the completed project, or whether those expenditures could apply to other uses of the land, the kind of project or the location and ultimate cost.
3. The acts of the land owner and whether or not they rise beyond mere contemplated use or preparation; and
4. The good faith of the landowner or developer with regard to whether or not they have notice of any proposed zoning or amendatory zoning before beginning any of the land improvements. *Id.*

In *Forman v. Clatsop County*, 297 Or. 129, 681 P2d 786 (1984) the Supreme Court had an opportunity to consider the roles the judiciary (including LUBA) and local governments should play in applying the vested rights analysis. It concluded:

“So-called “vested rights” do not exist in a vacuum, to be determined by a court abstractly without relation to the regulation against which the right is claimed. The term is relevant only as a shorthand phrase for one element of the applicable land use laws that may require a factual determination like other elements. Under the present legislative scheme, local governments necessarily determine many such facts in deciding on the “application” of their “land use regulations,” as those terms are defined in the act. If the facts are disputed, the determination must rest on substantial evidence in the whole record. Or. Laws 1979, ch. 772, § 4(7); see ORS 197.835(8)(a)(C). If the facts are not disputed, they may give rise to a question of law.” *Id.* at 133.

Given this limited scope of review, this court’s analysis cannot include whether Page is entitled to vested rights to complete construction of a 30 lot subdivision with individual dwellings, as it requires weighing the evidence presented in the first instance. This is a responsibility reserved solely for the affected local government.

For this reason, the analysis before this court must be limited solely to a legal one: Whether a common law vested right could apply in this case. As Plaintiffs-Appellants aptly outline in their brief, it is impossible for Page to retain any vested rights in her subdivision because her Measure 37 waiver is not final and is still subject to remand to the County. The previous land use decision that the County made no longer has 'legal effect' because the subdivision is not a permitted use on the County's EFU zoning regulations. *See Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008), *Pete's Mountain Homeowners Association v. Clackamas County*, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No. 2008-065, Sept. 25, 2008).

Further, as Plaintiffs-Appellants explain, vested rights can only exist for development that has obtained all of the necessary land use and building permit approvals. *See Mason v. Mountain Rivers Estates*, 73 Or App 334, 339, 341, 698 P2d 529, *rev den*, 299 Or 314 (1985). Page has not obtained the necessary preliminary or final plat approvals for her subdivision or any building permits for her dwellings. Without these permits, Page cannot satisfy the general rule that a landowner must have a building permit with substantial work completed pursuant to the permit. As a result, as a matter of law, Page has not established any vested rights.

Moreover, assuming *arguendo* Page is appropriately situated to seek recovery based on a theory of vested rights, as explained in great detail in the APA's Brief, it is impossible for Page, this court, or the county, to determine the cost of the project given the lack of specific direction in *former* Measure 37 for determining the value of the land after the Measure 37 waiver was issued. Essential to Page's overall claimed costs are the value of the land. Page relied on statements from a single valuation expert that the market value of 30 undeveloped residential lots on Page's property would be \$4,497,000. Proposed Stip Facts 3 ¶ 13.

This conclusion is based solely on the comparative value of lots that are not currently regulated allowing recovery for not only a purported loss caused by land use regulations as well

as any positive market increases for the unregulated lands that bear no relation to the subject property. Even if the Court could employ this exemption method, it is impossible to know whether the price differential is caused by an increase in the value of unregulated property or a decrease in the value of the regulated property. An additional unknown in this calculus is how the scarcity of other housing, the amenities or lack of either or both in the surrounding area could impact the value of either the regulated or the unregulated properties.

At its core, an analysis of whether a particular claimant has vested rights requires a comparison between the development costs already expended against the overall cost of the project. This overall cost cannot be determined without an accurate and practicable method for quantifying the value of the land and that value is solely the result of a Measure 37 waiver. In this way, any vested rights analysis under Measure 49 §5 holds over one of the most difficult to determine components of *former* Measure 37, that of valuation. If this Court decides to keep the vested rights inquiry at the forefront in evaluating the legal status of waivers under *former* Measure 37, the Court must also establish a lawful and understandable method for quantifying the value of the land. This is imperative because the methodology used in the challenged decision, and Measure 49 itself, does not do so. The judgment below must be remanded.<sup>1</sup>

DATED this 5<sup>th</sup> day of November, 2008.

GARVEY SCHUBERT BARER

By: 

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Edward J. Sullivan, OSB #69167  
 Carrie A. Richter, OSB #003703  
 Of Attorneys for Oregon Chapter of the  
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<sup>1</sup> APA joined these proceedings as an amicus in order to advocate the point that the valuation methodology of the trial court was neither correct, nor the only methodology dictated by *former* Measure 37. APA reiterates that point here and, in the light of its collective professional expertise in the area, also agrees with the Plaintiffs-Appellants with respect to the remaining issues in this case as well.

## CERTIFICATE OF FILING AND SERVICE

I certify that on the date indicated below, I filed the original and twenty (20) copies of the enclosed *AMICUS CURIAE* FOR OREGON CHAPTER OF THE AMERICAN PLANNING ASSOCIATION AND THE AMERICAN PLANNING ASSOCIATION'S SUPPLEMENTAL BRIEF REGARDING COMMON LAW VESTED RIGHTS with the:

State Court Administrator  
 Supreme Court Building  
 1163 State Street  
 Salem, Oregon 97301-2563

by first-class mail, postage prepaid. On the same date, I served two copies by first-class mail, postage prepaid, on the following parties:

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