



THE CIRCUIT COURT OF THE STATE OF OREGON  
TWENTY-FIFTH JUDICIAL DISTRICT  
YAMHILL COUNTY

JOHN L. COLLINS

PRESIDING JUDGE

Courthouse

Yamhill County

McMinnville, Oregon 97128

Phone (503) 434-7497

FAX (503) 435-3067

November 20, 2008

For Petitioners Biggerstaff, Damman & Kleikamp  
Ms. Isa Anne Taylor  
Attorney at Law  
7751 Baseline Drive  
Mt. Hood, Or 97041

For Respondents McClure  
Mr. Andrew R. Gardner  
Attorney at Law  
900 SW 5<sup>th</sup> Ave, Suite 2600  
Portland, OR 97204

For Petitioners Friends of YC  
Mr. Ralph O. Bloemers et al  
Attorneys at Law  
917 SW Oak Street, Suite 417  
Portland, Or 97205

For Respondents Johnson, Abrams and Greggs  
Mr. Edward H. Trompke  
Attorney at Law  
P.O. Box 230669  
Portland, Or 97281

For YC Board of Commissioners  
Mr. John M. Gray, Jr.  
County Counsel  
535 NE. Fifth Street  
McMinnville, OR 97128

For Respondent Cook  
Mr. Charles Hudson  
Attorney at Law  
601 SW Second Avenue, Suite 2100  
Portland, OR 97204-3158

Re: ***Biggerstaff v. Board of Commissioners (BOC) & Ralph and Norma Johnson***, CV08-0224  
***Damman & Friends of Yamhill County (FYC) v. BOC & Charles and Ellen McClure***, CV08-0225  
***FYC v. BOC and Maralynn Abrams***, CV08-0232  
***T.J. Kleikamp & FYC v. BOC & Glenn, Donald and Sharlene Gregg***, CV08-0304  
***FYC v. BOC & Gordon Cook***, CV08-0305

Dear Counsel and Parties:

**Introduction.** These consolidated cases involve review of Measure 49 vesting decisions pursuant to ORS 195.318. The scope of review is set forth in ORS 34.010 *et sec.* Each case involves a decision by the county vesting officer, pursuant to delegation by Yamhill County Board of Commissioners, that the respective landowners had a vested right to pursue development of their property in accordance with waivers obtained pursuant to Measure 37. All of the developments are located on Yamhill County land which became subject to farm or forest use restrictions after the owners acquired the property.

The court ruled, at an earlier hearing in these matters, that all parties have standing to seek judicial review. ORS 34.020. The court has also ruled on motions to strike, agreeing to consider the decisions of other courts only for their value as collateral authority, not binding and not a part of the “whole record” in the case.

The court heard oral argument from the parties and took the matter under advisement in order to more thoroughly study the briefs, arguments and record of the proceeding leading to the vesting decisions. Let me say, at the outset, that the court considers this a particularly important decision and has studied the cases and

considered each of the consolidated cases carefully. It is important for the community, the petitioner neighbors, Friends of Yamhill County, the respondent landowners and the county. It appears that counsel for the parties and the vesting officer whose decisions are under review have demonstrated their similar commitment by providing high quality pleadings, briefs and oral argument responding to carefully drafted, thorough and thoughtful analysis in the vesting officer's written decisions.

Pursuant to ORS 34.010 *et sec*, the issue, broadly speaking, is whether in the exercise of its quasi-judicial function of determining vested rights claims pursuant to Measure 49 and reflected in Yamhill County Ordinance 823, the County,<sup>1</sup> through its vesting officer, appears to have erred in one or more of the following ways:

- (a) Exceeded its jurisdiction;
- (b) Failed to follow the procedure applicable to the matter before it;
- (c) Made a finding or order not supported by substantial evidence in the whole record;
- (d) Improperly construed the applicable law; or
- (e) Rendered a decision that is unconstitutional.

There are common issues to all cases, though there are also aspects that require individual case analysis.

**Background.** While certainly well known to counsel and the parties in this case, it is useful to review the background leading to this matter. Measure 49 extinguished rights established by Measure 37. It provided three basic options, however, for landowners who choose to seek to continue to develop property previously subject to waivers obtained under Measure 37. Landowners could:

- Obtain express approval to build up to 3 homes (Section 6);
- Obtain approval to develop 4 to 10 homes (Section 7); or
- Seek a determination that the landowner had a common law vested right to continue and complete the improvements to the property (Section 3).

The landowners here have elected the third option. Each has obtained a decision from the county vesting officer that supports their right to continue development of the property in question. Based on a considerable volume of information in each case, the vesting officer ruled that the nonconforming measure 37 use of the property was fully completed by plat approval prior to the effective date of Measure 49 and, therefore, not governed the measure's "vested rights" provision. The vesting officer, however, also ruled that each landowner had established a common law vested right to proceed with development of their property under Measure 49 and county ordinance factors. Petitioners here are neighbors and the Friends of Yamhill County affected by the property developments and seek judicial review of the vesting officer's decisions.

Under the vesting officer's first basis for decision, the following, Measure 49, Section 5(3) is the key provision that applies (with editing and dates inserted for simplicity):

A claimant that filed a claim under Measure 37 on or a before June 15, 2007 is entitled to just compensation as provided in a waiver issued before December 6, 2007, to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on December 6, 2007, to complete and continue the use described in the waiver.

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<sup>1</sup> The decisions of Mr. Sadlo become the decisions of the county, so the court may, as have the parties, refer to the county as the decision maker.

OAR 660-041-0060, applicable to DLCD waivers contains similar language (similarly edited):

Any authorization for a Claimant to use Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6, 2007, as did the effect of any order of DLCD denying a Claim. A Claimant may continue an existing use of Property that was authorized under Measure 37, or complete a use of Property that was begun prior to December 6, 2007, only if the Claimant had a common law vested right to complete and continue that use on December 6, 2007, and the use complies with the terms of any applicable Measure 37 waiver.

In furtherance of Measure 49, Section 5(3), the County, on December 21, 2007, enacted Ordinance 823 establishing a process whereby Measure 49 vested rights claims were to be reviewed by a duly appointed “County Vesting Officer” to determine if the right to use and/or continue development of a use had become vested. That ordinance delegates exclusive authority to the vesting officer for vested rights decisions. Attorney Todd Sadlo was appointed.

The properties involved are as follows:

Property Owner(s) <sup>2</sup> / Case	Subdivision / Location	Planned Development
Ralph and Norma Johnson VEST-01-2007	Ra’ Nor Estates NE Chehalem Drive, Newberg	Up to 41 1-acre residential lots with dwellings, on 49.4 acres.
Charles and Ellen McClure VEST-02-2007	Vineyard Hill Properties Hwy 99W north of Newberg	Up to 40 residential lots w/ dwellings & commercial development of balance on 69 acres.
Maralynn Abrams VEST-12-2008	West Wind Country Estates Hill Rd, west of McMinnville	Up to 50 residential lots with dwellings on 50 acres and commercial development of balance.
Glenn and Diane Gregg et al VEST-34-2008	Fox Hill Farm Parrett Mt Rd & Smith Rd, Newberg	Up to 13 2- to 9.5-acre residential lots with dwellings + equestrian facilities on 78.26 acres.
Gordon F. Cook VEST-31-2008	Albertson Heights Albertson Road, Hillsboro	Up to 10 residential lots with dwellings on 38.8 acres.

There is no dispute that each landowner filed their respective Measure 37 claims before June 15, 2007, and that the respective waivers were issued prior to December 6, 2007.

**Background and Preliminary Issues.** The stated purpose of Measure 49 is to “modify Ballot Measure 37 (2004) to provide that Oregon law provides just compensation for unfair burdens while retaining Oregon’s protections for farm and forest uses and the state’s water resources.” As described in petitioners’ joint brief, the method by which Measure 49 modified Measure 37 is “not gentle.” All Measure 37 rights were extinguished.<sup>3</sup>

<sup>2</sup> In the McClure and Gregg cases there is an issue as to who is the claimant. The claimant is the person who owned the property when acquired prior to the changes that gave rise to Measure 37. Though Charles McClure and Sharlene and Donald Gregg may not qualify under that definition, it would not appear to make any difference in the outcome, so long as one of the current landowners was qualified under Measure 37.

<sup>3</sup> See, *Frank v. DLCD*, 217 Or App 498 (2008); *Corey v. DLCD*, 344 Or 457 (2008).

New options are created which may, or may not, allow use and/or continued development of property the landowners contemplated under Measure 37 waivers.

As stated, the option exercised by each of the landowners here is to seek a determination that the landowner established a common law vested right to continue an existing use of their property that was authorized under Measure 37, or complete a use of that property that was begun prior to December 6, 2007, where that use or completion of that use is consistent with the Measure 37 waivers.

Respondents (landowners and County) assert that the issue here may have Constitutional implications.<sup>4</sup> Perhaps. Certainly the term “just compensation” comes from constitutional provisions regarding taking of property, and there are often constitutional due process considerations in any taking of property. Petitioners characterize this assertion as a “red herring” – a deliberate attempt to change a subject or divert an argument.<sup>5</sup> Suffice it to say that it is not necessary for this court to decide this issue. It is sufficient to note that the legislature and voters have recognized that there may be statutory restrictions on specific uses of private property that may impose costs on property owners and have chosen to recognize the fairness of providing just compensation for that impact.<sup>6</sup>

Last week, the United States District Court decision in *Citizens for Constitutional Fairness v. Jackson County, et al*, No 08-3015-PA (November 12, 2008), was brought to the court’s attention. I respectfully disagree with the finding that a Measure 37 waiver is a contract between the County/State and the landowner. I do not see Measure 37 as giving a landowner a right to receive monetary compensation. Such payment is the County/State’s option, not the landowners. Accordingly, a waiver cannot be a contract because the County/State does not receive consideration in the form of giving up the pursuit of monetary compensation. I will not address further issues from this opinion as I do not feel they were fully briefed by the parties here and, for the most part, not applicable within the court’s scope of judicial review.

It is also important at this point to note what else is or is not in issue. This is not a question of whether this court agrees or disagrees with the decision of the vesting officer. This is not an appeal, nor is it *de novo* review where the court has latitude to substitute its own assessment of the facts. It is a judicial review of the vesting officer’s decisions for correct application of the law, jurisdiction and sufficiency of the evidence in support of factual findings or conclusions.<sup>7</sup>

The parties have also raised the preliminary issue of who has the burden of proof in this matter. That the term “burden of proof” is more applicable to trial proceedings where parties present evidence to convince the fact-finder to a certain level of proof – preponderance, clear and convincing or beyond a reasonable doubt. The proponent of a non-conforming use has the burden of persuasion before the vesting officer since non-conforming uses are disfavored.<sup>8</sup>

On petition for review, however, “proof” is not so much the issue. One does not “prove” an error of law, though one might have to *persuade* the court that one or more such errors were, or were not, made. One does not

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4 U.S. Constitution, Article XI, Section 4; Oregon Constitution, Article 1, Section 18.

5 Other definitions of “red herring” include “a technique used in literature to mislead the audience” and “kipper – a fish having been dried, smoked and salted”. Wikipedia. I suspect the definition in the text above is the one meant by the legal argument here.

6 See, *Corey v. DLCD*, 344 Or 457 (2008), *Penn Coal v. Mahon*, 260 US 393 (1922), *MacPherson v. DAS* 440 Or 117 (2006).

7 “Substantial evidence”, is the “probable cause” of judicial review.. It is an objective standard: “evidence that a reasonable person could accept as adequate to support a conclusion.” *Constant Velocity Corp v. City of Aurora*, 136 Or App 81 (1995).

8 See, *Holmes, infra*.

“prove” that a fact-finder did not have “sufficient evidence”, though one might persuade the court that findings of fact were or were not supported by evidence from which a reasonable person could make the finding made by the vesting officer. Some authority supports the concept that in judicial review there is no burden of proof *or* persuasion.

I conclude that there is no specific burden of proof *or* persuasion, just review by the court. Each side has opposing arguments: petitioners seek to persuade the court that there was an error of law and/or insufficient evidence to support one or more findings; respondents seek to persuade the court that there was not an error of law and/or sufficient evidence. It is that simple. If I am wrong about this issue, I would say that given the presumption that the law has been followed, that any burden of *persuasion* would at least initially be on petitioners and the court approached the analysis here with the concept that the decision below is presumed valid unless the court is persuaded otherwise.<sup>9</sup>

The court also owes no deference to the tribunal whose decision is under review except insofar as there may be a presumption that the law was followed.<sup>10</sup> This review is not akin to appeal or appeal *de novo* where appellate courts give appropriate deference to lower court findings if supported by the record, especially regarding findings of credibility of witnesses whose testimony was observed by the trial court and not the appellate or reviewing court.

**Allegations of Legal Error:** Petitioners assert that the vesting officer made the following errors of law:

- 1) Misconstrued the meaning of “use”.
- 2) Effectively transferred non-transferable Measure 37 rights by finding that purchasers from landowners can build dwellings.
- 3) Failed to apply a limiting factor of Measure 49 vesting – that the vested right comply with County and State waivers authorizing the use.

***The Meaning of “Use.”*** Petitioners take the position that “the deepest flaw that permeates all the Decisions is the erroneous and unsupported legal conclusion that the “use” vested by the applicants was the creation of ‘homesites’” established in connection with plat approval. “Use” is not defined in Measure 49 or 37. This is not surprising considering “use” is such a common term in land use (there it goes again) law that no specific or new definition would seem to be needed for application under these measures or, if it was, the legislature would have provided it. Yet, that, in a sense, is what the vesting officer’s application of the word appears to do in these cases – gives it a new meaning.

There is a prescribed method to determine if this misconstrues the law.<sup>11</sup> Initially one applies the plain meaning of the text. *Black’s Law Dictionary*<sup>12</sup> defines “use” as “the application or employment of something; *esp.*, a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional.” At this level, the vesting officer’s application of the word would not seem to be in keeping with the plain, albeit legal, general meaning of the word. Equating “use” with plat approval seems more like something that is merely temporary as opposed to a long-continued employment of the land for a residential or commercial use for which it was adapted pursuant to the waivers.

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<sup>9</sup> See also, *Commentary to OEC 305 cited by respondents.*

<sup>10</sup> *Sanchez v. Clatsop County*, 146 Or App 159 (1997); *Clackamas County v. Marson*, 128 Or App 18 (1994). ORS 40.135.

<sup>11</sup> *PGE v. BOLI*, 317 Or 606 (1993).

<sup>12</sup> Seventh Edition, 1999.

If an ambiguity calls for examination of the context of the word, it is applied in the context of laws regarding zoning classifications such as farm **use**, forest **use**, commercial **use**, residential **use**. At this level the vesting officer's interpretation of the word would also not seem to be in keeping with the context in which it is to be read. Thus "residential use", for example, has a broader context that plat approval which appears to be only a necessary step in the journey toward establishment of a use of the land for residential purposes. Stated otherwise, to utilize the more temporary application of the meaning of the word by equating it with a subdivision is to give the word a new meaning not required by the text or context of the measure.

Further, looking at it from the other end of the tunnel, ORS 92.010(17) defines "subdivision" as either an act of subdividing land or an area or a track of land subdivided." This is not a "use" as viewed in the context of land use law. It is an event in the process leading to residential use.

Measure 49 defines "homesites" as "approval of the subdivision or partition of property or approval of the establishment of a dwelling on property". There is no indication in the text or context of the measure or any legislative history in the record that would support the conclusion that establishment of homesites through approval of a plat map means "use". As argued by petitioners, zoning permits uses. Plat approval only defines the lots that may lead to residential use. There is a significant difference between creating a "parcel", "lot" or "homesite" (a unit of land) and a "dwelling" which creates a residential "use".

Further, if a building permit does not establish an irrevocable right to a use, then certainly plat or subdivision approval, an earlier step in the process under circumstances here of establishing residential use on farm or forest property, does not establish an irrevocable right to complete construction on the property.<sup>13</sup> Approval of the subdivision approves the land for a new use, but does not authorize or constitute use itself.<sup>14</sup>

The fact that opponents did not appeal plat approval does not make this any different, nor does it make this proceeding an impermissible "collateral attach" on the plat approval. An unappealed plat approval may be a "final land use decision."<sup>15</sup> But vesting issues are "just compensation" issues, not "land use" decisions. The final plat approval may define the approved project, but it does not determine whether the right to use the property or pursue or complete that use is vested under common law principles.<sup>16</sup> And this is why it is not surprising that LUBA has deferred vesting decisions to judicial review.

Yet a third way to analyze the vesting officer's interpretation of the word is the logical concept that it means

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<sup>13</sup> See, *Twin Rocks Watseco Defense Committee v. Sheets*, 15 Or App 445 (1973).

<sup>14</sup> There are numerous cases where a plat was approved and/or building permits were issued where that did not vest the developing landowner with irrevocable right to complete construction. See, e.g., *Milcrest Corp. v. Clackamas County*, 59 Or App 117 (1982) [unvested 220 acre portion]; *Mason v. Mountain River Estates*, 73 Or App 334 (1985).

<sup>15</sup> This is a concept that is key to the vesting officers decision that the landowners here had completed the nonconforming use before December 6, 2007, and that, therefore, Measure 49 did not apply as it would if the use were incomplete and therefore subject to the "vested right" to complete the use analysis of Measure 49, *Holmes* and Ordinance 823. It certainly presents a dilemma, easier seen with hindsight than when the plats were approved. Landowners should have the finality of approval of a final, or even preliminary, plat ordinarily establishes. On the other hand, neighbors who, as here, might oppose the development, under the reasoning of the vesting officer, were required to appeal a land use decision to LUBA in order to protect their right to object to the development under a law they had no more reason, at the time, to be assured would become law than did the landowners. Further, even if the appeal were unsuccessful before LUBA, it might be successful here, according to the vesting officer's reasoning, if it delayed finality of the plat approval beyond December 6, 2007. But how could either landowners or neighbors reasonably anticipate that?

<sup>16</sup> Even the plat approvals state, as a condition of approval of the plat: "Yamhill County makes no representation or warranties as to the transferability or development of any property rights related to the lots".

“the use defined in the waiver”. This requires a consideration of the language of waivers in each individual case:

***Johnson:***

*County:* “to make application to divide the subject property into one acre lots and build a single family dwelling on each undeveloped lot, a use permitted on the subject property at the time claimant acquired the property.”

*State:* “In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to the Johnsons division of the Property into lots or parcels or to the establishment of a single-family dwelling on each lot or parcel: those provisions of Statewide Land Use Planning Goal 3, ORS 215.780 and OAR 660, division 33 that restricts the division of the Property into lots or parcels or the establishment of a single-family dwelling on each lot or parcel, except for the provision of each of these laws that were in effect when Mr. Hoff acquired his interest in the property on May 1, 1956.”

*This Court’s Summary of Both:* To subdivide the 41 acre property into 41 1 acre lots and to build a single family dwelling on each lot.<sup>17</sup>

***McClure:***

*County:* “to make application to divide the subject property into residential and commercial lots of various sizes of less than one acre to over one acre and, upon the Planning Director’s issuance of land division approval, to make applications to establish dwellings or other uses on the newly created lots under land use regulations then in effect on May 15, 1967.”

*State:* “In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Ellen McClure’s division of the 69.18-acre property into a maximum of forty 1-acre parcels or her development of a dwelling on each parcel and to her development of the remaining property for commercial uses: applicable provisions of Goals 3 and 14, ORS 215 and OAR 600, division 33. These land use regulations will not apply to the claimant only to the extent necessary to allow her to use the subject property for the use described in this report, and only to the extent that the use was permitted when she acquired the property on May 15, 1967.”

*Courts Summary of both waivers:* To subdivide the 69.18-acre property in up to forty 1-acre lots and build a single family dwelling on each lot and to develop the remaining property for commercial uses.

***Abrams:***

*County:* “to make application to subdivide the subject property into various lot sizes ranging from less than one acre to over one acre for residential and commercial development, a use permitted on the subject property at the time claimant acquired the property.”

*State:* “In lieu of paying just compensation under Measure 37, the State of Oregon will not apply the following laws to the (sic) Ms. Abrams’ requested division of the Property into lots or parcels or to the establishment of single-family residential dwellings or urban type commercial uses on each lot or parcel on each lot or parcel (sic): those provisions of Statewide Land Use Planning Goal 3, applicable provisions of ORS 215, including, but limited to, ORS 215.780, and OAR 660, division 33 that restrict the requested use of the subject property to the extent necessary to allow Ms. Abrams a use of the property permitted at the time she acquired the Property (tax lot 4513-100 on December 19, 1952; tax lot 4418-1000 on January 3, 1955; and

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<sup>17</sup> It is implicit that the subdivision plan must be approved as required by law and dwellings must meet code requirements. That also, of course, applies to the subdivisions of other landowners.

tax lot 4418-1100 on November 18, 1968)”

*Courts Summary of Both Waivers:* To subdivide the property (50 acres) into various lot sizes for residential and commercial development or to build dwellings or urban type commercial uses on each lot.

**Gregg:** (Second waivers)

*County:* “to make application to subdivide the subject property into 13 lots and, upon the planning director’s issuance of final subdivision approval, to establish single family swellings on undeveloped lots, a use permitted on the subject property at the time the claimant acquired the property.”

*State:* “In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to the claimants’ division of the 78.26-acre subject property into 13 2- to 9.5-acre parcels, to their development of equestrian facilities on the remainder of the property: applicable provisions of Goal 3, ORS 215 and OAR 660, division 33, enacted or adopted after each claimant acquired the subject property.”

*Courts Summary of Both Waivers:* To subdivide the 78.26-acre property in up to 13 2- to 9.5-acre lots and to build single family dwellings on each lot and to establish equestrian facilities on the remaining property.

**Cook:**<sup>18</sup>

*County:* “to make application to divide the subject property into ten lots and, upon the Planning Director’s issuance of land division approval, to make applications to establish dwellings on undeveloped lots under land use regulations then in effect on December 3, 1970.”

*State:* “1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Gordon Cook’s division of the 38.8-acre subject property into nine 2.69-acre parcels and one 12.4 acre parcel or to his development of a dwelling on each 2.69-acre parcel: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6 and 33. These land use regulations will not apply to the claimant only to the extent necessary to allow him to use the subject property for the use described in this report, and only to the extent that use was permitted when he acquired the property on December 3, 1970.

2. The action by the State of Oregon provides the state’s authorization to the claimant to use the property for the use described in this report, subject to the standards in effect on December 3, 1970.”

*Court’s Summary of Both Waivers:* To subdivide the 38.8-acre property into nine 2.69 acre lots and one 12.4 acre lot and build dwellings on each of the smaller lots, but, apparently, not the larger one.

With the exceptions noted, in each case, the waivers approve subdivision into lots and the building of a

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<sup>18</sup> There appear to be some discrepancies between the county and state waivers regarding the Cook property. The county waiver appears to authorize a dwelling on the 12.4 acre lot but the state waiver does not. I would assume this was intentional and the more restrictive would seem to govern since nonconforming uses are disfavored. Also, the state waiver appears to allow subdividing of the property OR the building of homes, but, by implication, not both. This may be a situation where the discrepancies need to be interpreted in manner that does not create an absurd result. That interpretation would mean the waivers allow both subdivision *and* home construction. Note, too, that neither waiver limits the waiver to a “single family” dwelling. The county waiver also does not limit the number of dwellings to one per lot (unless they were so limited on December 3, 1970). Perhaps this footnote is “much ado about nothing” and the parties are clear regarding these aspects of the waivers.

dwelling or other structure on each lot. The logical interpretation of the use as defined in the waivers is *both* the subdivision AND the building of buildings. If the county and/or state had intended to grant only authority to subdivide and not authority to build they would have said so. Or, they could have said that subdivision established the use which would also have made it clearer that the county and/or state intended to allow the landowners to subdivide and sell the lots and leave it to purchasers to construct, or seek to construct, dwellings or other buildings consistent with a residential or commercial use.

Further, the requirement that the use comply with the terms of the waiver could seem superfluous if the use is limited to the use *described* in the waiver.

I conclude that the vesting officer misconstrued the law when he equated “use” with “subdivision of the property and establishment of homesites.” The plain meaning of “use” means a “residential use” or “commercial use” and requires actual employment of land for that purpose. That is not to say it requires *completion* of construction of a dwelling or commercial building. That is at the core of the vested rights concept – that a landowner has the right to *complete* construction necessary for that use, if the landowner has met the common law vesting requirements to do so. The text and context of the word “use”, does not support the vesting officer’s interpretation. “Use” does not mean “subdivision” or establishment of “homesites”.<sup>19</sup> If “use” means the use described in the waivers, the vesting officer’s interpretation also fails this test. None of the above definitions of the word “use” leads to the conclusion that subdivision and approval of the plat map alone constitutes the “use” contemplated by either Measure 37 or 49.

***Transfer of Non-transferable Measure 37 Rights.*** Without going into lengthy discussion of the spate of litigation on this issue, it is fair to say that Measure 37 rights are not transferrable. A use, however, *completed* prior to December 6, 2007, may be transferrable because it does not fall under Measure 49. But, as discussed above, the use was *not completed* prior to that date in these cases, including the Johnson case which involves a transfer of some of the lots. The fact that individual lots can be transferred after plat approval, does not mean that the new owner has any vested right to use that lot or parcel in a nonconforming way.<sup>20</sup>

On the other hand, a use fully established prior to the Measure 49 deadline *or* partially completed but vested under common law analysis *is* transferrable as a non-conforming use.<sup>21</sup> This will be discussed more fully later in this opinion letter.

Based on the analysis above, I would conclude that there is substantial evidence in the record to support a finding that the Johnsons had a vested and therefore transferrable interest in the lots in October, 2006

Stated otherwise, the landowners can only transfer what they have that is transferrable. If they have a Measure 37 waiver, it is not transferrable; therefore the transferee did not obtain it and can do no more than perhaps pitch a tent on the property. If the owner had a vested right to complete the residential use of the

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19 “Platted but undeveloped land is not normally regarded as a ‘use’ in zoning law for purposes of establishing a prior nonconforming use.” *Parks v. Tillamook County Board of Commissioners*, 11 Or App 177, 196 (1972). *Yamhill County v. Ludwick*, 294 Or 778 (1983).

20 See *Parks v. Tillamook County Commission*, 11 Or App 483 (1981). A “vested right” is an incomplete nonconforming use. A nonconforming use relevant here is a use that was lawful at the time the property was acquired – *i.e.*, before the applicable zoning ordinance was enacted and effective.

21 See, *e.g.*, more discussion of this in *Letter Opinion in Crook County v. all Electors*, Crook County Case 05CV0015. Also, Measure 49(11)(6) provides that “[a]n authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization.”

property, that vested right runs with the land and *is* transferrable. Therefore, if the land was a lot that was transferred at a time when the original owner was vested with the right to complete the property to residential use, then the buyer *did* obtain the right the owner had the right and authority to transfer. The new owner may build a dwelling considerably more enduring and suitable than a tent.

Stated one more time, as is about to be analyzed, if the owner established a vested right to complete the project or use of the land prior to transfer, the vested right *does* run with the land and is transferrable so long as the transferee uses the property in conformance with the vested right and other applicable zoning restrictions.

***Compliance with State and County Waivers.*** Petitioners assert that the vesting officer misconstrued the law by failing to require that the vested right use comply with the State and County waivers authorizing the use. Measure 49 DOES clearly limit the scope of the use that can vest by limiting it to a “use of the property [that] complies with the waiver.” The vesting officer, essentially, found that approval of the preliminary plat and subsequent recording of the final plat “constituted substantial evidence that the applicants’ use of the property complied with the waivers from the State and County.” Petitioners characterize this as a “short-cut” and a misapplication of applicable law. This may *seem* like a shortcut, but as discussed more fully herein, this court finds substantial evidence in the record – explicit or by fair implication -- apart from reliance on approval and recording of the plat to establish compliance to the extent the waivers required establishment or vested right to completion of a residential use. Construction of a dwelling is not necessarily required in order to establish residential use of the overall property. The question is whether there is substantial progress in the overall development that renders the right to start or complete that construction.

It *is* a fair implication from the approval of the subdivisions that each subdivision complied with the 1959 Yamhill County subdivision ordinance that was in effect when the property was acquired. Hence, using this implication, there is substantial evidence in the record on this aspect.

**Common Law Vested Rights:** This court has ruled that the vesting officer misconstrued the law in deeming the use fully vested by approval of the subdivision plat. Nonetheless, the landowners may still be entitled to continue and complete development of the residential use of the land consistent with Measure 37 waivers if the landowners have established a vested right to do so under the common law. The vesting officer, albeit as an alternative finding, concluded that each landowner had done so. The question for this court is whether there is substantial evidence to support the conclusion that sufficient common law vesting factors had been established.

The factors are guidelines, not a “checklist”. Though it appears the expenditure factor is the most significant under the circumstances of these cases, no one factor is determinative. The underlying precept is fairness and the question of whether a landowner has proceeded far enough is an issue of fact to be decided on a case-by-case basis. The commencement of construction must have been substantial or substantial costs toward completion of the project must have been incurred. All the principles just recited and the common law criteria are most attributable to *Clackamas County v. Holmes*, 265 Or 193 (1973), and the factors are also set forth in Ordinance 823.

The factors the vesting officer is to consider, and did consider, are as follows:

- 1) *Expenditures Ratio:* The amount of money spent on developing the use in relation to the total cost of establishing the use.
- 2) *Good Faith:* The good faith of the property owner.
- 3) *Notice:* Whether the property owner had notice of he proposed change in law before beginning

development.

- 4) *Adaptability*: Whether the improvements could be used for other uses that are allowed under the new law.
- 5) *Use/location/cost*: The kind of use, location and cost of the development.
- 6) *Mere preparation*: Whether the owner's acts rise beyond mere contemplated use or preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.
- 7) *Other*: Other relevant factors.

*Expenditure Ratio*: Before more closely addressing this factor, the court must consider whether the vesting officer used the correct denominator in the ratio where one was provided and whether the failure to establish a denominator in the record is fatal to establishment of a vested right to complete develop of the residential use.

According to *Holmes*, the denominator in the ratio is the “total cost of establishing the use.” As discussed in the earlier portion of this opinion, the “use” is *not* the submission and approval of a subdivision plat. It is the completion of the permitted use. That use must be a residential – or in two cases, commercial -- use permitted at the time the property was purchased and subsequently prohibited by EFU zoning, and it must be consistent with the terms of the Measure 37 waiver that allow the non-conforming use. What that specifically means will vary, of course, according to the specific property. In general terms applicable to the cases here, it means subdivision of the property into smaller lots and establishment of single family dwellings on those lots or, in some instances commercial use. In more specific terms, it is the “Planned Development” summarized in the first chart in this opinion, page 3 and again on page 13, with some refinements discussed below.

I conclude that a specific determination of the denominator in each of these cases is not necessarily required. Further, even it is, consideration of the other factors may be so favorable to the landowner that the absence of a denominator is simply not fatal to the ultimate conclusion which requires consideration of *all* factors.

The denominator may be more important in other cases where, for example, the total cost of establishing the approved use is lower than in these cases. If the total cost of completing a use is \$50,000 and the landowners have spent \$5,000 that would seem to be a substantial investment, all things else considered (10%). If the total cost is \$50,000,000, even \$50,000 may *not* be a substantial investment (.1 %) – i.e., a reflection of substantial progress toward completing the final use – sufficient to weigh this factor in favor of the landowner. Here, of course, the total costs of perfecting the use are somewhere in between. And, in this court's view, it may be possible to determine that the expenditures and progress is “substantial” without a clearly defined estimate of total cost. Appellate cases appear to have applied, or at least allowed, this approach in the past.<sup>22</sup> If the landowners have spend what a reasonable person could conclude is a substantial amount of money that would seem to be a substantial investment so long as the fact-finder can at least reasonably infer that it is a substantial expenditure in relationship to the reasonably foreseeable cost of completion.

This court must also address at what point in time the expenditures no longer count in this factor. For reasons discussed below under the “Notice” factor, I conclude that expenditures made up until December 6, 2007, count, so long as they were made in furtherance of establishing a completed residential use of the property.

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<sup>22</sup> See, e.g., *Webber v. County of Clackamas*, 42 Or App 151(1979). This case does refer to the ratio of expenditures to the projected overall cost of the project and noted that the record contained no such evidence of projected overall cost. However, the court was satisfied that the project of construction of 250 houses is “obviously a multimillion dollar proposition, and that the ratio of prior expenditures to the total cost of the project is far less favorable to the vested right than the 1:14 ratio in *Holmes*....” *Id.*, at 155. Note, too, that this case appears to reject the landowners position that because they intended to sell bare lots, the project was virtually completed, so the “denominator” should be their total expenditures as of plat approval. This would be at or near a 1:1 ratio, clearly beyond substantial. That is much like the position taken here, but rejected in *Webber*.

Also at issue in some of the cases is whether expenditures by persons or entities other than the landowners counts toward the expenditure factor. The records support the vesting officer's inclusion of expenditures paid by third parties. The vesting officer could reasonably conclude that third parties were acting as agents of the landowners and/or that the landowners would, by contract, be sooner or later, financially responsible for the expenditures.

In the case of the Johnsons, there is the matter of the buildings variously described as “homes”, “placeholder buildings”, or “shacks”. Even the vesting officer noted that the construction of these buildings at least “has a bad faith quality to it.” I conclude that whether or not they were constructed in a bad faith effort to acquire a vested right in completion of residential use of the lots, they were not built in furtherance of the residential use.<sup>23</sup> The record does not demonstrate that these small buildings – I will use the term “sheds” were intended for gardening or some other use arguably adjunct to the dwelling and residential use of the lot. Rather it appears they were built as temporary “dwellings”, with plumbing and electricity solely for purposes of advancing the extent of expenditure on dwellings. While neither the vesting officer nor this court should speculate, it is nearly impossible to envision those buildings becoming the dwellings the residential use contemplated. Moreover, they fail to meet the CC&Rs requirements for size.<sup>24</sup> The most likely scenario is that they will be used for what they are – sheds -- on site or separately sold and removed as garden or utility sheds.

I conclude that the cost of these buildings should not be considered in the expenditures of the landowners to be considered in the expenditure factor. It misconstrued the law by not requiring the expenditure to have been made in furtherance of the use or completion of the use and/or it was an error of fact to count it as part of the expenditures. The sheds were, at best, built in furtherance of an effort to obtain vested rights, but there is no evidence in the record to suggest they were built in furtherance of the permitted, though nonconforming, residential use of the property. They are not the “single family dwellings” referred to in the waivers.

The record nonetheless provides substantial evidence, excluding the cost of the sheds, from which the vesting officer could find that the Johnsons expended sufficient funds and resources to meet the expenditure test. The vesting officer in fact found that they had spent enough as of the time the plat was finally approved and recorded, a time prior to the construction of the sheds, and there is sufficient evidence in the record to support that conclusion.

The vesting officer found the respective expenditures, based evidence in the record and work performed as summarized in the chart at the top of the next page.

**PLANNED DEVELOPMENT<sup>25</sup>  
EXPENDITURES**

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23 This might be a good time to remind counsel and parties that this is not a question of whether this court might find construction of the buildings as bad faith. It is only a question of whether there is substantial evidence supporting the vesting officer's finding or, more accurately, conclusion that they were *not* built in bad faith. Or, whether, regardless of this single good faith factor, there is sufficient evidence in the record to support the overall conclusion that collectively the *Holmes* factors weighed persuasively in favor of sufficient effort and investment into the establishment of residential use that the right to complete construction and development has become vested. *See also, Union Oil Company v. Clackamas County*, 81 Or App 1, 7-8 (1983).

24 Johnsons argue that the CC&Rs are not applicable to them, only persons who purchase the lots. Technically, this may be true. But it does reinforce the notion that these sheds will never be used by the present landowner or any subsequent purchaser because they are of vastly inadequate size.

25 The summary of the planned development is repeated here to give perspective to the dollar amounts and work – not unlike the kind of perspective that might be provided by a specific dollar amount as denominator.

**ESTIMATED TOTAL WITH HOUSES  
SUMMARY OF IMPROVEMENTS RELATED TO USE AS DESCRIBED IN WAIVERS**

<b>Johnsons</b>	<b>McClures</b>	<b>Abrams</b>	<b>Gregg</b>	<b>Cook</b>
Up to 41 1-acre residential lots with dwellings, on 49.4 acres.	Up to 40 residential lots w/ dwellings & commercial development of balance on approx 69 acres.	Up to 50 residential lots with dwellings on 50 acres and commercial development of balance.	Up to 13 2-9.5 acre residential lots with dwellings + equestrian facilities on 78.26 acres.	Up to 10 residential lots with dwellings on 38.8 acres.
\$300,000+ to complete and record the final plat; \$1,472,657 prior to 11/6/07.	\$1,600,000 prior to 12/6/07	\$1,000,000 prior to 11/6/07, approx. \$2,000,000+ total	\$412,000+ before 11/6/07; \$488,000 before 12/6/07.	\$136,000 before 11/6/07; \$155,000 before 12/6/07
Total with houses approx \$2,300,000 <sup>26</sup>	\$3,700,000; \$15,404,796 by FYC estimate	27	27	27
Legal, planning, surveying and other plat preparation, electric service, gas, telephone cable and water systems, septic systems and roads. [Sheds not counted]	Road construction, subdivision, improvements to access road, landscaping, trails, annexation and city service, plan design. Binding agreements with the City of Newberg and Yamhill County.	Electric, gas, telephone cable, paved streets, wells and water systems, roads and septic system approvals. construction of homesites and single family dwellings	Surveying, engineering, obtained waivers and approvals, 13 septic systems, paved roads, 13 building permits, 1 well, roadway and site drainage.	Engineering, excavation, installation of utilities, some roads and septic systems, agreements with water cooperative and county

It is not necessary here to further consider the details of evidence regarding expenditures in each case. It is sufficient that this court, as a court of review and not initial impression, determine whether the facts taken as a whole present sufficient evidence to support the conclusion of the vesting officer.

I conclude that the whole record provides substantial evidence in support of the vesting officers finding that each landowner, in good faith, made significant expenditures in furtherance of their planned development in comparison to total project cost including dwellings.<sup>28</sup> Where a denominator for total project cost is not specific, it is, as in *Webber*, reasonably inferred from the record.

26 This may be somewhat flawed by inclusion of a \$15,610 cost per dwelling (total \$640,000). Perhaps that is the cost of the sheds. Even if the cost of houses is doubled, though, there is sufficient evidence to make this factor favorable to the landowners.

27 The court is unable to locate figures for total construction, including houses. The vesting officer states that in most cases this is speculative in any event. Perhaps I have simply not found more specific figures. As stated, this may not be fatal. However, if any of the parties think it might be, the court would receive additional written argument as to whether this matter should be remanded the case to the vesting officer for that finding.

28 With regard to the Johnsons, this would appear to still be the case even after disregarding the cost of the sheds.

The vesting officer had substantial evidence from which to conclude that this factor weighs in favor of vesting in each case.

*Good Faith Factor:* The only substantial issue of good faith is the Johnsons construction of sheds on the properties. As indicated above, there is sufficient evidence to support the vesting officer’s finding that they were not built in bad faith. Nonetheless, as indicated above, because they were not constructed in furtherance of the residential use and are not single family dwellings described in the waivers they do not count toward the Johnsons investment in the overall project regardless of whether they were built in good faith.<sup>29</sup>

In the case of the McClures, their good faith claim is further bolstered by the extensive communication and work done in consultation with the City of Newberg. The fact that all claims were advanced in open communication with the county and state further supports the good faith nature of their actions. No landowner in these cases was proceeding without openly obtaining the necessary approvals.

This factor, then, is supported by sufficient evidence in the record and favors vesting of the development in each case.

*Notice Factor:* This factor is much debated by the parties. It is, in this context, important not to impute one’s own perception of the amount of publicity regarding potential restriction of Measure 37 to come out of the legislature and subsequent vote.<sup>30</sup> It is about what these landowners perceived and/or a reasonable person would perceive or should be aware of in diligent prosecution of the development of property under these circumstances. The question, once again, on this factor is not whether the court might reach a different conclusion, but rather whether there is substantial evidence in the record to support the conclusions of the vesting officer.

The vesting officer’s conclusion regarding this factor is supported by sufficient evidence in the record and favors vesting of the development in each case.

In addition to that, it seems to this court that Measure 49 presents something of what I will call a “yellow light/green light dilemma.” That is, landowners with Measure 37 waivers were placed by Measure 49 in a position not unlike a driver approaching an intersection and observing BOTH a yellow traffic light and a green traffic light. Does the driver proceed ahead on authority of the green light or endeavor to stop safely as signaled by the yellow light? The yellow light was shining brightly on the highway of residential development of farm/forest property pursuant to Measure 37 waivers. Something dramatic could change in the law. But what that change *could* be was not clear until the bill was passed out of the legislature. And then, the probability that the bill embodied in Measure 49 would pass was in considerable doubt – certainly not the kind of probability on which to make sound business decisions.

The green light in the metaphor is the provision in the bill and the Measure that gave landowners until December 6, 2007, to establish a vested right to complete or continue their development. The end result is more like the lame interpretation of the meaning of a yellow light: “Hurry up and make it if you can, before the light turns red.”

I conclude that the notice factor does not negate any otherwise qualified expenditures incurred (even if bills

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<sup>29</sup> Compare, *Holmes, supra*, where owners were proceeding without permits.

<sup>30</sup> Measure 37 was poorly written, to boot, making the form of revision, or even if it would be revised, contributed to the uncertainty. Also, I am not sure if it is in the record, but the court takes judicial notice that Measure 37 passed by a wide margin.

paid later) before December 6, 2007. Even if the date is November 7, 2007, the result does not change.

*Adaptability Factor:* The issue here is whether the work performed on the properties could be adapted to a conforming use, or one of the two alternatives established by Measure 49 -- express approval to build up to 3 homes or somewhat more complicated approval to develop 4 to 10 homes. Landowners must show before the vesting officer that the restrictions would deprive them of any opportunity to derive reasonable economic value from their investment.<sup>31</sup> It is significant that what we are talking about in each case is significantly more than the limited development established by Measure 49. The infrastructure established in each case – streets, utilities, septic systems, dwellings, *etc.* -- is considerably more consistent with a much larger number of lots and dwelling subdivision than even a 10 lot and dwelling project. The raw number of dwellings contemplated in the Gregg and Cook developments is closer to the 10 house option offered by Measure 49, but the vesting officer and the court must consider all the expenditures, not simply the number of intended dwellings. Even where fewer dwellings are contemplated, the investment in infrastructure and progress toward completion of the intended use amply establishes use more consistent with the intended development than with any agricultural use or more limited Measure 49 use.

I find overall that there is sufficient evidence in the record from which the vesting officer could conclude that the construction and expenditure in each case is significantly more consistent with each intended development than it is with a conforming use or a limited development allowed by Measure 49. This factor, then, also weighs in favor of vesting in each case.

*Use/Location/Cost Factor:* The kind of use, location and cost involved in each development varies somewhat. All are near existing infrastructure, just outside urban growth boundaries. The McClure property is especially positioned near surrounding housing, as opposed to open farm land. The Abrams property is right across Hill Road from other housing.

There is nothing in the record that would make this factor weigh against vesting as found by the vesting officer.

*Mere preparation Factor:* I conclude that there is ample evidence in each case for the vesting officer to have concluded that the landowners had gone well beyond mere preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects. Substantial infrastructure was involved in each case. No one was waiting around a bare plot of land with, at best, a shovel, some string and stakes and a set of plans. All had progressed significantly further than that and the evidence in the record supports that conclusion.

The record supports the vesting officer's conclusion that this factor weighs in favor of vesting in each case.

*Other Factor(s):* All parties agree that the list of factors in *Holmes*, Measure 49 and Ordinance 823 is not exclusive. Petitioners however, argue that the vesting officer considered an additional factor that is not consistent with the overall fairness factor contemplated by the vested rights concept. Specifically, the vesting officer considered the additional factor of "the nature of the change in law". The court cannot say that, as a matter of law, this is an inappropriate additional factor. Certainly, the vicissitudes of this very significant change in land use law initiated by Measure 37 may be a factor to consider, keeping in mind that the ultimate goal is fairness. This is a spectrum apart from adjusting some building code requirement. It is perhaps the most major

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<sup>31</sup> If the vesting officer so finds, then the question for this court is whether there is substantial evidence to support that finding and, when considered together with all the other factors a common law vested right has been established.

change in land use law since 1972. The law indeed changed dramatically for persons with long-time ownership of farm and forest property and, it should not be forgotten, for their neighbors. It was neither a simple change nor one lending itself to simple application. It often involved clearly competing interest between neighbors and impact on water supplies affecting even larger areas. It was a change qualitatively different than the less complex situations outlined in appellate cases dealing with common law vested rights.

I do not conclude that consideration of this additional factor is legally inappropriate or “misconstrued the law”, and that is the only question for this court on review. Moreover, the vesting officer qualifies this factor as being one that would not change the vesting officer’s overall conclusion. Accordingly, consideration of this factor appears to be harmless error at best.

*Overall Consideration:* I conclude that there is substantial evidence in the record to support the conclusion that the factors taken collectively establish a vested common law right to complete the residential use of the property as described in the waivers.

***Summary of Rulings on Matters of Law.*** The vesting officer misconstrued the law in each case by concluding that the right to complete construction on the properties was completed when the landowners gained plat approval. Plat approval is a step in the process, not a completion. The developments were not, as a matter of law, completed by plat approval and therefore fully vested – or otherwise a completed use -- prior to implementation of Measure 49. The fundamental error behind the misapplication of the law is application of the incorrect meaning of the word “use”. Plat approval fails to meet the definition of “use” by any of the possible definitions discussed above. In this context, the “use” is a residential or commercial use as more specifically defined in each case by the Measure 37 waivers that are the basis for the nonconforming use.

The vesting officer also misapplied the law in concluding that the Johnson lots were transferrable when the plat was approved. They may have been transferrable when sold, but only if the Johnsons had a vested right in development of the property prior to the transfer – *i.e.*, a transferrable vested right as opposed to a nontransferrable Measure 37 waiver. I conclude that there is substantial evidence in the record to support the conclusion that the Johnsons had, prior to the transfers, a common law vested right that ran with the land and therefore was transferred to the purchasers.

The vesting officer based his decision on alternative theories. As indicated above, the vesting officer misconstrued the law on the issues described above. The vesting officer’s alternative analysis nonetheless is supported by substantial evidence in the record and results in rights vesting with the landowners pursuant to the common law.

***Summary of Ruling as to Vested Rights:*** The record supports the conclusion that the landowners here relied in good faith on the waivers granted by the County and State and the plat approved by the county and not appealed. They acted on that good faith in pursuing local necessary permits and approvals and in investing substantial effort and financial resources in to making progress toward completion of the residential use defined in their projects. Uncertainties of the Measure 49 revisions do not impute clear notice to the parties any sooner than November 6, 2007, and the provisions of Measure 49 further give the landowners until December 6, 2006, to establish a common law right to complete.

The record also supports the conclusion that the investments made are more suited for the development contemplated by the parties as opposed to a conforming use or one of the Measure 49 alternatives.

Overall, then, the record supports the vesting officer's conclusion that, considering *all* the relevant common law factors, each property owner has a vested right to complete construction necessary to complete the residential use consistent with the Measure 37 waivers.

***Judgment:*** The decisions of the county through its duly appointed vesting officer are annulled in part and affirmed in part. Insofar as the decisions are based on a misapplication of the law in concluding that the property became fully vested, or was not subject to Measure 49 at the point of plat approval, the decisions are annulled.

Insofar as the decisions are based on findings that the landowners have a vested right to complete development of the property under principles of common law, they are affirmed.

Separate judgments as to each case should be prepared. Counsel for each of the landowners should prepare the judgment. A draft, of course, should be sent for approval as to form by the county and to the petitioners before submission to the court.

Sincerely,

JOHN L. COLLINS  
Presiding Judge