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Via Email to planning@co.marion.or.us **and First Class Mail**
Marion County Hearings Officer
Marion County
Planning Division
P.O. Box 14500
Salem, OR 97309

Re: Opposition to Ralls vesting determination M06-14
Supplemental Submission from Friends of Marion County, Keep Our Water Safe Committee and Brian Hines

Dear Marion County Hearings Officer:

This office represents the Friends of Marion County and individual property-owners in Marion County that are adversely affected and aggrieved by Measure 37 claims. We provide these comments on their behalf in order to ensure just compensation, not more or less, consistent with the law. These comments supplement the comments that our clients provided earlier.

A. Background.

The claimant in this case, Sheryll A. Ralls, (the "Claimant") may not maintain the partition of her property as a common law vested right because she never established a use of the property and, therefore, the Measure 37 waiver has expired. Measure 49 only allows claimants who received a Measure 37 waiver to keep that waiver if the claimants established a use of the property. *See* February 24, 2005 Letter from Stephanie Striffler to DLCD Director Lane Shetterly (Attached); *Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (August 1, 2005 letter opinion); *Jackson County v. All Electors*, Jackson County Circuit Court No. 05-299-E-3(2) (January 19, 2007 Order) (Attached); *Wiley v. Multnomah County*, Multnomah County Circuit Court Nos. 0702-01482 and 0704-04735. (Letter Opinion of September 20, 2007) (Attached). The circuit court in *Wiley v. Multnomah County* determined that a subdivision is not a use. In sum, the act of partitioning property is not an act of establishing a use. The passage of Measure 49 resulted in the expiration of the Claimant's Measure 37 Waiver. OAR 660-041-0060. The partition of property was done pursuant to this waiver and therefore it has also expired.

When the Claimant received her waiver from the Department of Land Conservation and Development ("DLCD") on October 10, 2006 the stated purpose was: "to divide the 9.66-arce subject property into six approximately 1.6-acre parcels for residential development." Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, October 10, 2006, State Claim Number M124984 at page 1.

The Claimant's stated purpose in the waiver was to establish residential development, not to simply divide the property. The waiver authorized a change in the *use* of the property from what was allowed. Under applicable zoning, the property could only have been divided into two acre residential lots and then the owner could have sold those lots or developed them and sold them. However, the Measure 37 waiver did not entitle the claimant to subdivide the property into lots and sell those lots without any development on them. The claimant first divided the property into four 1.5 acre residential lots and one 3.66 acre residential lot, but the designated use of the Claimant's property under the waiver was residential development and that use was never established. The Claimant's original plan stated in the waiver request was modified. The Claimant's attorney, Mr. Shipman, has indicated that the Claimant still intended to divide the 3.66 acre lot, thereby giving the claimant six lots.

B. Analysis.

Now that Measure 49 has passed and the claimant must show 1) a common law vested right to complete and continue and 2) that the use is consistent with the waiver. The claimant alleges that she established a vested interest in the use of her property by the fact that she obtained a Final Partition Plat for all her parcels on August 20, 2007. This contention is without merit.

1. Partitioning is Not a Use.

As decided by the Oregon Land Use Board of Appeals in *Schoonover v. Klamath County*, the partitioning of land does not establish the use of the land: "The definitions of 'lot', 'partition', and 'subdivision' carry no inference that the approval of a partition or subdivision carries with it a right to a particular use of the lots created by the partition or subdivision." 16 Or LUBA 846, 851 (1988) (also quoting *Columbia Hills v. LCDC*, "platted but undeveloped land is not normally regarded as a 'use' in zoning law for purposes of establishing a prior nonconforming use..." 50 Or App at 490-491 (1981).

In *Schoonover*, a property owner had subdivided his property into 104 lots in 1970 for the purpose of residential development. *Id.* at 848. However, prior to any actual development, in 1984 his property was re-zoned as property where single-family dwellings were allowed only if "necessary and accessory to permitted uses." *Id.* The property owner argued that because he had already gained the plats for his property with the specific purpose of developing houses on the lots, the re-zoning of this property was a violation of the prohibition against retroactive subdivision and partitioning in ORS 92.285. *Id.* The Court held that the platting of a property does not protect the use of a

property and that nonconforming uses can only be protected if they have been established and vested. *Id.*

Like the property owner in *Schoonover*, the Claimant has only accomplished the initial step of platting her property for the desired use of residential development. This action does not satisfy the requirement that the claimant vest the use specified in the waiver. Therefore, the Claimant's partition is not vested for purposes of Measure 49.

Arguably, under ORS 92.016-025 a final plat recording should give a property owner security in the division of their property. However, as Claimant and every claimant who sought Measure 37 waivers came to understand, Measure 37 waivers for uses were not transferable until the use was established by the original claimant. In other words, vesting a Measure 37 waiver was not possible. The claimant had to establish the use that was sought in the waiver in order to make a legal transfer. The DLCD explicitly stated in the Final Staff Report and Recommendation concerning the Claimant's property that the waived land use regulations was only to be waived "to the extent necessary *to allow her to use the property* as described in this report..." [emphasis added] Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, October 10, 2006, State Claim Number M124984 at page 7. The proposed use of the property was personal to the Claimant and required her to establish a rural residential development of six approximately 1.6-acre parcels. The act of partitioning the property is not the establishment of a use.

The Claimants' own attorneys (in their Powerpoint presentation) to this hearings officer stated that the use is "a proposed use in rural residential." The Claimant has not commenced construction on any of the proposed residential structures. The only action that Claimant has completed is the application for and approval of her partition and property line adjustments, along with a bit of road construction. Since the enactment of Measure 49, the nonconforming uses allowed by Measure 37 may only be continued if the property owner has established a common law vested right. DLCD explained the meaning of a vested right to be "the right to complete and continue a use of real property when the law changes." Ballot Measure 49 and the Common Law of Vested Rights. Guidance from the Oregon Department of Land Conservation & Development and the Oregon Department of Justice. December 31, 2007 at page 1. However, the Claimant is not trying to argue that she has a vested right in the use of her property. Instead, the Claimant contends that she has a vested right in the partition of her property. The primary difference between these arguments is that the first is a use protected under Measure 49 while the latter is not; Measure 49 only protects vested rights in the use of a property.

2. Denominator Must Utilize Cost to Establish Use.

The Claimant asserts that the partitioning of her property established a vested right in the use of her property as residential. However, this line of argument is flawed because the Claimant seeks to use the cost of partitioning as the total cost of the project.

The total cost of the project must utilize the cost of the rural residential development of her property as the denominator instead of the mere division of the property.

The reason that the Claimant cannot use only the cost of partitioning her property as the denominator and must use the total cost of development of her parcels is because Measure 37 development rights are not transferable. Since Measure 37 development rights are not transferable, the selling of her parcels as buildable lots is not an option and therefore the total cost of development is the only plausible denominator.

In *Webber v. County of Clackamas*, the Oregon Appeals Court did not allow a property owner who had invested around $ 110,000 dollars in the water storage and lines for buildable lots he was going to sell prior to a zoning change be considered vested. 42 Or App 151, 154 (1979).[1]

Pursuant to Marion County Ordinance No. 1255, Sec. 6(3)(a) the hearings officer will consider a multifactor test when determining the status of vested rights which includes: "(A) The ratio of expenditures incurred to the total cost of the project; (B) The good faith of the developer; (C) Whether the developer had notice of any proposed zoning or amendatory zoning before starting the improvements; (D) The type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to other various uses of the land; (E) The nature, location, and ultimate cost of the project; (F) Whether the actions rise beyond mere preparation; and (G) Other relevant factors."

The Claimant did review these factors, but her attorneys used an incorrect denominator in a blatant attempt to try to manipulate the ratio test. The proper denominator is the cost of developing the resulting parcels into residential development as claimed in the waiver. The cost of developing is not just the partitioning of the property. The claimant has the responsibility and burden of the claimant to prove the relevant factors supporting their case; the "one who claims a nonconforming use bears the burden of proving the facts upon which the right to such a use is based." *Webber v. County of Clackamas*, 42 Or App 151, 154 (1979).

Under Measure 37 and Measure 49, the Claimant should have compared the price incurred, a claimed $19,626.78, not to the cost of partitioning the parcels, but to the cost of constructing the residential developments on the property. Although one home already is located on the original parcel, the development of four or five more residential structures would surely far exceed the alleged project's estimated cost of $24,725.00 dollars. There is only one home on the property now. The claimants' attorney, Mr. Shipman has not established that Mr. Brown has built a home. Neither the Claimant nor

[1] In *Webber*, the plaintiffs contended that they intended to sell their land without making any additional improvements, and that therefore, their project was virtually completed. The plaintiffs argued that the ratio test should be applied to their total expenditures, rather than to the total cost of the intended residential development. The Court rejected this approach as untenable because "an economically sound ratio of water system cost to homesites is higher than its ratio to developed lots, but either ratio is a part of the same economic algebra based on the projected price of the houses at the time of sale to consumers."

the purchaser has obtained a building permit. Marion County issued a stop work order on Mr. Brown after Measure 49 passed.[2]

3. Claimant Did Not Establish Use Prior to Referral.

Looking next at the claimant's good faith in the project, the Claimant asserts that because her plat was finalized before the election date of Measure 49 all her actions leading to the vesting of the use of her property were done in good faith. However, as of June 15, 2007, HB 3540 was pending before the people and so any work done while the significant changes proposed by Measure 49 were pending was made in bad faith. The passage of Measure 49 was proposed by the legislature and the legislature took prompt action to refer the law to the people and any claimants pursuing development prohibited by Measure 49 bore the risk that it would pass. Measure 49 was well-publicized and its effect on Measure 37 claims was set forth in the ballot title: **"Yes vote modifies Measure 37; clarifies private landowners' rights to build homes; extends rights to surviving spouses; limits large developments; protects farmlands, forestlands groundwater supplies."** Ralls recorded the final plat for her property line adjustment on August 7, 2007, almost two months after Measure 49 was released to the public. Ralls knew or should have known the risks of her actions.

4. Claimant Had Notice of Pending Change In Law.

The next element, whether the Claimant had notice of any proposed zoning or amendatory zoning before starting the improvements, fails for the same reasons as the element of good faith. Again, the Claimant knew or should have known that the referral of Measure 49 threatened to override any actions that were beyond the scope of what was (and is now) allowed by the change in the law. The Claimant took the risk that Measure 49 might pass.

5. Adaptability to a Conforming Use.

Similarly the next elements, the type of expenditures and the nature, location, and ultimate cost of the project, are not in Claimant's favor. The Oregon courts have decided that investments that can be adapted to serve a conforming use because of their nature and location, cannot be used to establish a vested right to complete a nonconforming use. For development of the kind prohibited by Measure 49, the question that any claimant (and the Hearings Officer must address) is whether the expenditures that have been made could apply to other uses of the land that are permitted under the

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[2] The Court of Appeals in *Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 held that expenses incurred toward use, where the use had not received all required approvals, could not be counted toward determining existence of a vested right. The Claimant here only incurred expenses prior to obtaining any building approval, and therefore these expenditures are not relevant. *See also SK Fin. SA v. La Plata County*, 126 F3d 1272, 1278 (10th Cir. 1997) (distinguishing Ecklund on the basis of expenditures made before versus after approval similar to *Mason*). Furthermore, all claimants incurred expenses in getting Measure 37 waiver orders from the State of Oregon and from Marion County. The expenditure ratio factor, however, may only consider the costs of the actual development, not expenditures to obtain the Measure 37 waiver orders.

law. This factor was discussed in *Clackamas County v. Holmes* 265 Or 193 (1973) (whether the expenditures have any relation to the completed project or could apply to various other uses of the land) and in a companion case *Washington County v. Stark*, 10 Or App 384 (1972) (culverts, barn and other construction were adaptable to other permitted uses).

In *Holmes*, the Supreme Court set forth a multi-factor test, however, it does not permit one factor to be ignored or discarded. All claimants must prove the factors that are relevant to the matter at hand, and in most case, all factors will be relevant. No one factor is predominant. *Eklund* 36 Or App 73 at 81 (1978) ("None of these factors is predominant"). In *Holmes*, the Oregon Supreme Court discussed this factor as follows:

> "The court found that the landowner had failed to show the expenditure for the widening of the road was accomplished for the exclusive purpose of accommodating the shopping center, because such widening was equally consistent with using the property for residential purposes."

Holmes at 198, *citing to Town of Hempstead v. Lynne*, 222 NYS2d 526 (1961). Likewise in *Webber v. County of Clackamas*, 42 Or App 151 (1979), the Oregon Court of Appeals stated that a person trying to prove vested rights "must show not only that they will lose the anticipated return on their investment, but also that the water system is incompatible with alternative uses." *Webber* at 154. The common law provides that the "one who claims a nonconforming use bears the burden of proving the facts upon which the right to such a use is based." *Webber* at 154, citing to 1 Anderson, The Law of Zoning, § 6.09 (1976).)

So, the burden is on the claimant to prove each of the factors that apply from the multi-factor test. The decision maker that applies the law must consider each and every factor. The decision maker cannot give any one factor more weight than another factor.

Similarly to this attempt to establish vested rights, in *Webber*, the landowners had incurred $110,000 in expenses in constructing a water tank and water main to support a subdivision of about 250 homes. The Oregon Court of Appeals found that the landowners had not acquired a vested right to develop the subdivision because the claimant could have an adequate return on his investment by using the line to sell water to other developments. 42 Or App at 156.

In general, there is a strong presumption for conforming uses: "[n]onconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan." *Clackamas Co. v. Holmes,* 265 Or. 193, 197 (1973). In this case, the Claimant spent $8, 729.35 dollars on excavation and road improvements. There is nothing in the record that remotely suggests that those expenditures could be applied to support houses allowed under Measure 49. In other words, those expenditures could be and are adaptable to permitted conforming uses. Claimant has not and cannot make the showing that this work is not adaptable to the permitted uses allowed under Measure 49.

C. Conclusion

The Claimant has not established a vested interest in the use of her property. The mere partitioning of her property cannot be considered a use and is only an initial step in the development of the residential use of her property. Although it is unfortunate that the Claimant has expended funds, these funds are meager compared to the expected returns and were done in bad faith.

Regardless of the fact that the Claimant has incurred expenses that cannot count towards vesting, these expenses are adaptable toward a conforming use. These include septic work and driveway construction. The improvements to Parrish Gap Road to bring the frontage up to current standards would be required by Marion County for any new development on the Ralls property. While the road work that was done in July 2007 is not a valid vesting expense, it may be adapted to the uses allowed under Measure 49. If the claimant had sought the one additional lot allowed under the current 2-acre minimum lot size requirement, without filing a Measure 37 claim, the Claimant would have been required to make the same road improvements. In a January 25 email message, Byron Meadows, Marion County Land Development & Permits Engineer, told our client, Brian Hines, that "one lot either way would not change your requirements."[3]

Finally, the sale of the undivided lot to Jim Brown was done on December 3, 2007 before the use had even been established. The Claimant did not have the right to transfer the property before the use had been established. Furthermore, the transfer was made after Measure 49 was enacted.

For the following reasons, the Friends of Marion County, the Keep Our Water Safe Committee and individual neighbors and property owners in the County ask that the hearings officer enter the following findings: 1) the Claimant is not vested and the Measure 37 waiver order has expired and 2) the Claimant did not lawfully transfer the Measure 37 waiver to Mr. Brown, and the partitioned property that has been sold is not vested and cannot be developed. Feel free to contact me directly if you have any questions.

Sincerely,

Ralph O. Bloemers

cc: Roger Kaye, Friends of Marion County
Keep Our Water Safe Committee
Clients

[3] The fact that public road improvements were required points to the fact that the "use" of this property is residential. (If the intended use was merely to partition the 9.66 acres into two additional lots, with no home construction, there would be no need to modify Parrish Gap Road. However, there is, because the claimant's intended use is to site a home on each lot.)