


Memorandum

To: Dan Atchison, City Attorney
From: Jeffrey G. Condit, P.C. 
Client: City of Salem
Subject: Vested Rights Argument in Case No. SPR-DAP18-15 for Development of the Kuebler Gateway Shopping Center
Date: September 18, 2020

On August 14, 2019, the Oregon Land Use Board of Appeals ("LUBA") remanded a decision of the City of Salem (the "City") denying the above-noted application. *M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___ (LUBA No. 2018-143). LUBA concluded that the City incorrectly interpreted its 2007 comprehensive plan and zone change decision involving the property (the "2007 Decision")¹ as prohibiting a Costco store, but upheld the City's finding that M & T Partners, Inc. ("Applicant"), had not demonstrated that it was necessary to remove certain Oregon white oak trees located on the property within the meaning of the City's tree regulations. LUBA also remanded the decision because the City failed to address Applicant's argument that they had a vested right to complete the shopping center as approved in 2007 Decision and therefore the City could not apply its site plan review standards (which include requirements to comply with the City's tree regulations) to deny the development of the shopping center. You ask for our opinion on that question, based upon the record of the proceedings.²

Short Answer

Applicant has demonstrated a vested right to complete the shopping center as approved in the 2007 Decision as to all matters decided by that decision. This means:

¹ Order No. 2007-16-CPC/ZC Comprehensive Plan Change/Zone Change No. 06-6-CPC/ZC (December 10, 2007).

² The opponents to the shopping center appealed LUBA's decision to the Oregon Court of Appeals on the Costco question; the Court upheld LUBA's decision.

- The Council cannot revisit the conditions of approval imposed at that time as part of site plan review, including those with regard to off-site transportation improvements.
- Applicant does have to obtain site plan approval and demonstrate compliance with the applicable criteria. However, those criteria, including the tree regulations, cannot be applied to deny the shopping center outright or require Applicant to reduce the size of the shopping center, because the proposed shopping center is within the size limits vested by the 2007 Decision.

The Legal Framework

The "vested rights" doctrine protects uses that have not yet been established but for which there has been a sufficient good-faith commitment that it may be completed even though it will become nonconforming as result of later enactments. *See Fountain Vill. Dev. Co. v. Multnomah Cnty.*, 176 Or App 213, 221, 31 P3d 458 (2001) (vested rights are "in effect, inchoate nonconforming uses.")

The threshold problem in this case is that the proposed development is not a nonconforming use; it is an outright permitted use in the zone. Applicant's argument is not about the use, but rather that their site expenditures vest them in the right to develop the shopping center as approved in 2007 and that the City may not apply current law in way that would deny or limit such development. There is no case law directly on point for guidance; all of the case law involves uses that became nonconforming as a result of a change in the law. The vested rights doctrine, however, is basically an equitable remedy akin to estoppel (a legal principle that in this case would prevent the City from imposing regulations because that imposition would contradict what the City previously approved). For this reason we believe that a vested right to develop as approved by the 2007 Decision could be perfected as Applicant argues. Otherwise, a property owner could expend funds in good faith on infrastructure designed to support a particular approved use, only to have that use denied or modified.

The vested rights doctrine is not statutory; it has been developed over time through case law. As noted by Applicant, the seminal case is *Clackamas Cnty. v. Holmes*, 265 Or 193, 508 P2d 190 (1973), which articulated several factors to consider when determining whether a vested right exists.

Application of the *Holmes* Factors

We apply the *Holmes* factors to the record.

Expenditure-Ratio Test. The 2007 Decision permits the development of a shopping center of up to 299,000 square feet of gross leasable area ("GLA"). The site plan application proposes a shopping center well within this framework. Applicant states that the total cost to complete the proposed shopping center is approximately \$51,000,000. The record shows that Applicant has spent \$3,765,190 in transportation

and other site improvements consistent with the 2007 Decision and \$9,602,177 on site and developments for the medical clinic and in furtherance of the future development of the shopping center. Considered separately or together, these are legally significant expenditures toward development of the shopping center within the meaning of *Holmes and Friends of Yamhill Cnty. v. Yamhill Cnty.*, 351 Or 219, 237, 264 P3d 1265 (2011) (which recognizes that the larger the project and the more significant the initial investment, the less the ratio is the deciding factor). Finally, all of these expenditures were made in furtherance of the only permitted use allowed under the zoning code at the time they were made. See *Lung v. Marion Cnty.*, 21 Or LUBA 302 (1991).

Good Faith/Notice of Amendatory Zoning. Applicant appears to argue that the 2007 Decision provided the process for site development review and so Applicant should not be subject to the City's site plan review standards.

Although the City site plan review requirements were not in effect in 2007, they were adopted in 2008 and became effective in 2009, before the expenditures listed in Applicant's narrative were made. Property owners can and should expect that land use procedures will change over time.³ To any degree that Applicant is arguing that they do not have to comply with the site plan review criteria because of vested rights, we disagree.

In addition, the legislative history included in the record indicates that the primary purpose for the enactment of site plan review was to provide a public process with right of notice and appeal because of the many discretionary decisions involved with determining compliance with applicable criteria at the building permit stage. Adoption of site plan review did not change the underlying applicable criteria. For example, the City's tree regulations were adopted in 2000, and SRC 808.030(a)(2)(L), which provides an exception for a tree removal permit when removal is necessary in connection with construction of a commercial or industrial facility, was added to the Code in 2005, both prior to the 2007 Decision.

However, we agree with Applicant that adoption of the site design requirements did not put them on notice that the shopping center could be denied or that issues that were decided by the 2007 Decision could be revisited. As Applicant and LUBA noted, site plan review is generally intended to regulate the physical characteristics of an approved use, not to approve or deny an application outright.

Type of Expenditures/Whether Expenditures Are Related to the Completed Project. The expenditures are directly related to implementation of—and indeed in many cases required by—the 2007 Decision and later decisions applicable to the property. See, e.g., *Eklund v. Clackamas Cnty.*, 36 Or App 73, 583 P2d 567 (1978).

³ In *DLCD v. Curry Cnty.*, 19 Or LUBA 249, 256 n.5 (1990), LUBA charged the applicants for a vested right with constructive notice of a court decision that rendered their proposed subdivision nonconforming, even though they did not have actual notice of the decision. LUBA therefore concluded that expenditures after the date of court decision should not be included in the vested rights determination.

As Applicant notes, there is only one type of development permitted on the subject property, and all of the expenditures are clearly intended to further that development. The conditions imposing infrastructure improvements in the 2007 Decision are expressly intended and designed to accommodate a shopping center development of up to 299,000 square feet of GLA.

Analysis

For the above reasons, we believe that Applicant has demonstrated a vested right to complete the development as to all issues that were decided by the 2007 Decision. Regardless of the vested rights doctrine, we think that this same result is also dictated by the law of the case doctrine. *See, e.g., Beck v. Tillamook Cnty.*, 313 Or 148, 153, 831 P2d 678 (1992). The 2007 Decision was a quasi-judicial comprehensive plan amendment and zone change applicable to a specific property, and thus had to be judged under the standards and criteria in effect at the time of application. *See* ORS 227.173(1) & 227.178(3). As Applicant notes, the 2007 Decision is explicitly detailed as to the type, size, and conditions of development. The 2007 Decision has more in common with a master plan approval than a standard comprehensive plan amendment/zone change request.⁴ Subsequent development under a master plan is not required to revisit issues decided by the plan.

In our opinion, the 2007 Decision decided the following issues:

Size. The 2007 Decision approved a shopping center of up to 299,000 square feet of GLA. This is the only use approved for the site.

Type of Use. The use includes any commercial use that can be sited on the property given the GLA limit. LUBA has decided that "commercial use" includes a Costco store. LUBA's decision is now final.

Infrastructure Improvement Requirements. The detailed conditions of approval with regard to required off-site and site-adjacent improvements were imposed to accommodate a shopping center of up to 299,000 square feet of GLA under the standards and criteria in effect at the time. Further, the 2007 Decision was appealed to LUBA, in part based upon the City's transportation findings, and was affirmed. *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008).

Under either the vested rights doctrine or the law of the case doctrine, we believe these determinations are final and vested and may not be revisited at the time of site plan review.

There are specific site design issues, however, that were not decided as part of the 2007 Decision that are applicable at site plan review: ingress and egress (to the extent not dictated by the transportation condition imposed in 2007), site layout, location of structures and parking, internal circulation, landscaping, and design review.

⁴ The 2007 Decision did not approve a particular site plan or configuration for the development.

The 2007 Decision relied on conceptual plans designed to show how a shopping center of up to 299,000 square feet of GLA could be sited on the property, but they were clearly not intended to be the final design.

This brings us to the tree regulations. As noted above, the tree regulations were in effect in substantially their current form at the time of 2007 Decision. The 2007 Decision does not expressly address the tree regulations. Applicant points to a general finding in the 2007 Decision that there were no environmental conditions on the site that would preclude development of a shopping center of 299,000 square feet of GLA and to a conceptual site plan showing structures in the area of the subject trees. Because there is no analysis or any specific findings regarding tree removal, however, it is impossible to discern whether this finding included or did not include an analysis of the tree regulations. The City could have made this finding because the tree regulations are applied at the time that trees are removed, and so it was not an applicable criterion, or it could have been because of the exception in the tree regulations that allows removal of trees when necessary to site a permitted commercial development. A tree removal plan was approved for the site at the time of the amendments to site the medical clinic. As Applicant has testified, that plan specifically deferred a decision on the trees at issue in this application until site plan review for the shopping center. This approval was not challenged at the time.

In our opinion, based upon this history, Applicant is required to demonstrate compliance with the City's tree removal regulations as part of site plan review of the shopping center. But because the size and nature of the shopping center allowed on this site are vested, we do not believe the tree regulations can be applied to require Applicant to reduce the size or change the nature of the shopping center. In order to meet the "necessary to remove" test, however, Applicant does have the burden to demonstrate that the shopping center of the size and type proposed cannot be reconfigured to save the trees.⁵

Please feel free to contact us if you have any further questions.

⁵ We understand that Applicant is also arguing in the alternative that they are not "removing" any trees within the meaning of the tree regulations because of their proposal to transplant the trees on another part of the property.