EXHIBIT P.1

MEMORADNUM

To: Record, T2-2021-14768
From: Katherine Thomas, Assistant County Attorney
Date: September 17, 2021
RE: Expiration of Permit in Case No. T2-2014-3377

INTRODUCTION

The issue in this case is whether the Planning Director correctly determined that the permit in Case No. T2-2014-3377 (the "Permit") expired because the owners failed to timely commence construction. For the reasons set forth in the Staff Report, at hearing, and below, the County requests that the Hearings Officer affirm the Planning Director's decision.

SUMMARY OF ARGUMENTS

Under the plain text of the Permit and Multnomah County Code ("Code"), the Permit is subject to the two-year expiration period in MCC 37.0690(B)(1), and the Appellant did not commence construction, as required, within that timeframe.

The Appellant does not argue that he commenced construction within that two-year expiration period or that the plain text of the Code provides for a longer expiration period for this type of dwelling. Instead, the Appellant presents several arguments objecting to the application of the two-year expiration period to the Permit and arguing that he did, in fact, commence construction during the longer four-year expiration period in MCC 37.0690(C).

First, the Appellant argues that, after Permit issuance, County actions and statements indicated that the Permit was subject to a four-year expiration period and that, as a result, the *Holland* case prohibits the County from changing its interpretation to apply the two-year expiration period. However, most of the actions and statements that the Appellant points to did not provide any express interpretation of the expiration provisions. In addition, *Holland* confirms that the County is entitled to correct the one misstatement that staff did make, which

was not ratified by the County's policy-making body, that is contrary to the plain text of the Code requiring application of a two-year expiration period. Moreover, even if the County were required to apply the four-year expiration period, the Appellant did not commence construction within that time because he did not combine or otherwise put together parts of the foundation.

Second, the Appellant argues that the County is estopped from applying the two-year expiration period. However, the Hearings Officer does not have equitable authority in this case because both state statute and County Code require the Hearings Officer to make these types of decisions based on the standards in the Code. Even if the Hearings Officer did have equitable authority, the County cannot be estopped from applying the two-year expiration period or its "commencement of construction" standard because staff did not make false statements of material fact on which the Appellant reasonably relied, and even if they had, equitable estoppel cannot operate to waive mandatory requirements of an ordinance. Finally, as noted, even if the four-year expiration period applied, the Appellant did not timely commence construction.

The Appellant's remaining arguments are similarly unavailing. OAR 660-033-0140, which provides permit expiration dates for development on resource land, does not apply directly to the Permit because the County's Code is acknowledged.

In addition, the Appellant cannot make a vested rights claim because there has been no change in the applicable zoning laws. The Appellant has not sufficiently distinguished the holding in *Heidgerken* that the vested rights doctrine does not apply where the only "change" is expiration of a permit, nor has the Appellant sufficiently developed its vested rights argument.

Finally, ORS 197.307(4), which requires the adoption and application of "clear and objective" standards regulating "the development of housing," does not apply to this case because the 2017 amendments that broadened application of that statute beyond needed housing

within the urban growth boundary apply only to permit applications submitted for review after August 2017. The applicability of those amendments turns on when the permit application was filed – here, well before 2017 – and not on when the government regulation was adopted or applied. Moreover, even if the 2017 amendments did apply, the County's expiration provisions are clear and objective.

I. Under the plain text of the Permit and the Code, the Permit is subject to the two-year expiration period in MCC 37.0690(B)(1), and the Appellant did not commence construction during that period.

In relevant part, at the time the Permit was issued, the Code included two initial expiration periods: a two-year expiration period applicable to approvals that "include[] a structure" and a four-year expiration period applicable to "residential development" as defined in MCC 37.0690(C)(4). (Exhibit B.1, MCC 37.0690(B)(1) and MCC 37.0690(C)); *see also* (Exhibit A.1, Condition 5 of Permit citing to MCC 37.0690 for expiration standards).

As explained in the Staff Report, except for "residential development," all development approvals that include a structure expire "[w]hen construction has not commenced within two years of the date of the final decision." (Exhibit B.1, MCC 37.0690(B)(1)). In addition, and importantly, under MCC 37.0690(D), permit expiration is automatic, regardless of whether the County provides notice of expiration: "Expiration under (A), (B), or (C) above is automatic. Failure to give notice of expiration shall not affect the expiration of a Type II or III approval." (Exhibit B.1, MCC 37.0690(D)).

Here, there is no dispute that the Permit approves a structure (specifically, a dwelling) under provisions that are not included in the definition of "residential development" in MCC 37.0690(C)(4). Therefore, under the plain text of the Permit and the Code, the Permit is subject to the two-year expiration period in MCC 37.0690(B)(1), making the relevant expiration date September 11, 2017 (two years from the September 11, 2015 date of final decision).

In addition, there is no dispute that the Appellant did not "commence construction" prior to the end of the two-year expiration period. The only actions that were taken prior to September 11, 2017 were the submittal of plans for building permit review and an application for a Grading and Erosion Control permit. (Exhibit 2 of Exhibit H.1); (Exhibit B.2). No work on the site began until 2018, after the two-year expiration period had ended. (Exhibit B.3 – statement that foundation contractor started work in May 2018); (Exhibit H.1 – statement that foundation work was completed in September 2018); (Exhibit 12 of Exhibit H.1 – invoice for grading in September 2018).

Accordingly, for the foregoing reasons, the Planning Director correctly determined that the Permit has expired.

II. *Holland* confirms that the County can correct prior misstatements, particularly statements not ratified by the policy-making body. Even if that were not the case and the County were required to apply the four-year expiration period, the Appellant did not commence construction within that period.

The Appellant argues that the County cannot apply the two-year expiration period or assert that the Appellant did not timely commence construction based on a series of staff statements and actions, which include the following:

(1) February 12, 2018: County completion of Building Permit Review (Exhibit B.5)
(2) February 14, 2018: County issuance of Grading and Erosion Control Permit (Exhibit B.6)
(3) August 1, 2018: Email from staff planner including statement, "hope everything is going well with the construction" (Exhibit 7 of Exhibit H.1)
(4) May 9, 2019: Email from staff planner including statement, "I have also received notice that you have begun work on your single-family dwelling again." (Exhibit 8 of Exhibit H.1)[1]

[1] The Appellant asserts that staff's reference to "Best Management Practices" in that same 2019 email shows that staff understood the Appellant to be engaging in construction because "if the Reeds' home were not under construction, they would not have to observe 'best management practices.'" (Exhibit H.1, page 7). However, read in context, it is clear that staff is referring to "Best Management Practices" as required by the Grading and Erosion Control Permit, not practices required by the Permit at issue. (Exhibit 8 of Exhibit H.1). Staff stated: "I would like to remind you as part of your Grading and Erosion Control permit, you or your contractors are required to maintain 'Best Management Practices', which includes dust mitigation and management." The Appellant agrees that grading is insufficient to constitute construction, and therefore the reference to "Best Management Practices" in relation to the Appellant's grading activities has no bearing on the issues here.

(5) June 11, 2020: Email from staff planner citing to four-year expiration period. (Exhibit 9 of Exhibit H.1).

All of the actions and communications occurred after the September 11, 2017 expiration deadline, and the only communication that expressly cited the four-year expiration period occurred after the September 11, 2019 expiration deadline.

A. The County is entitled to correct past misstatements that have not been ratified by the County's policy makers.

The Appellant argues that *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701, *rev den*, 328 Or 115 (1998) prevents the County from changing its interpretation of the expiration provisions during proceedings on the same case. Not only is *Holland* distinguishable, but it in fact expressly provides that local governments *can* change their interpretations, particularly when doing so to correct earlier statements that have not been ratified by the policy-making body. *Id.* at 459.

In *Holland*, the issue was whether the goal post rule in ORS 227.178(3) required the city to maintain its interpretation that a code provision did not apply to a particular application. *Id.* at 454. There, the city had treated the code provision as inapplicable before, during and after the filing of the application: first, through a city attorney's letter prior to the application filing; second, through a staff report issued during the pendency of the application; and third, through a city council decision on a separate application while the application at issue was on appeal. *Id.* at 452-53, 459. The city did not change its interpretation about the applicability of the provision until its original decision was remanded for further consideration. *Id.* at 454.

In holding that the city could not change its interpretation on remand, the court explained that the city likely would not be bound by the prior interpretations of the city attorney or staff report "if what was involved here was simply a single application that was making its way

through the various advisory and dispositional stages of the city's process." *Id.* at 457. What was notable, the court found, was that the city council's decision on a separate application had ratified those staff interpretations. *Id.* at 459; *see also Jones v. Willamette United Football Club*, 307 Or App 502, 514, 479 P3d 326 (2020) (noting that *Holland* "did not turn on just one employee's interpretation of the meaning of a standard" and instead involved ratification by the local policy-making body).

The court went on to note, however, that it accepted "at least as an abstract proposition, the premise that a local government may 'correct' its earlier interpretations of its legislation." *Id.* It also made clear that it did "not categorically foreclose the possibility that * * * there may be circumstances under which a city governing body may appropriately change a previous interpretation as to whether a particular provision is an approval standard during its proceedings on a particular application." *Id.* As a result, contrary to the Appellant's assertions, *Holland* supports the County's ability to correct a prior misstatement, particularly where that statement was expressed by staff email and not ratified by the County's policy-making body.

B. County staff's statements and actions generally did not offer express interpretations of the expiration provisions in MCC 37.0690, and the County's policy makers did not ratify staff's statements and actions.

In addition to confirming that the County can correct past misstatements, *Holland* is distinguishable on the facts. There, the city attorney, land use staff, and the city council all adopted the same interpretation before, during, and after the relevant application was filed. In contrast, here, there is no evidence that before or during the pendency of the application, the County cited to the four-year expiration period or provided a different definition of "construction." Moreover, although the Appellant draws inferences from the actions and statements of County staff, most of those actions and statements did not provide any express

interpretation of the expiration provisions or any indication of an intent to provide an interpretation of the County's expiration provisions. There is evidence of only one communication in which staff expressly cited to the four-year expiration period, and that communication occurred after September 11, 2019 (four years from the date of final Permit approval). (Exhibit 9 of Exhibit H.1). At no point did staff offer an express interpretation of the meaning of the term "construction." Taken together, staff's statements and actions do not come close to an express interpretation ratified by the policy-making body as occurred in *Holland*. As a result, the County is entitled to correct the prior citation to the four-year expiration period set forth in staff's June 11, 2020 email.

C. Even if the County is required to apply the four-year expiration period, the Appellant did not "commence construction" in that timeframe.

If the Hearings Officer concludes that the County is bound to apply the four-year expiration period described in staff's June 11, 2020 email, the result in this case remains the same because the Appellant did not "commence construction" by September 11, 2019, four years from the date of the final Permit decision.

MCC 37.0690(B)(1) and MCC 37.0690(C)(1)(a) describe what qualifies as commencement of construction for purposes of avoiding permit expiration: "Commencement of construction shall mean actual construction of the foundation or frame of the approved structure." (Exhibit B.1). To address the meaning of "actual construction," the Staff Report cites to the dictionary definition of "construction," which means "the act of putting parts together to form a complete integrated object." The Appellant has offered a slightly different definition of the term "construction" than the County, relying on the definition of the verb "construct," meaning, to "form, make, or create *by combining parts or elements*." (Exhibit H.1) (Emphasis added.). Based on that definition, the Appellant argues that "the permittee must have done at

least some physical work on the site associated with foundation construction that is more than site grading." (Exhibit H.1). That interpretation, however, does not fully address the definition the Appellant offered.

Despite minor differences, what both definitions share is the fact that construction requires that parts for the foundation or frame be put together or combined in some way. The act of excavating the foundation of a house, or of providing utilities to a home site, does not constitute combining or putting together parts of the foundation.

As explained in the Staff Report, where grading and excavation are sufficient acts to satisfy the expiration standard, the Code expressly says so. In particular, MCC 37.0690(B)(1) provides that "actual excavation of trenches" and "actual grading of the roadway" constitute commencement of construction for certain types of structures. (Exhibit B.1). The courts recognize that when different terms are used, particularly in the same provision of law, they should be given different meanings. *See State v. Meek*, 266 Or App 550, 556, 338 P3d 767 (2014) (citing "general assumption that, when the legislature employs different terms within the same statute, it intends different meanings for those terms"). As a result, the text in context demonstrates that excavation does not constitute construction.

The letter from BDZE Construction does not dictate a different result. That letter lays out "the approach to a typical reinforced concrete residential foundation." (Exhibit H.2). If Appellant's position is that this letter represents what constitutes construction, then simply staking or marking the foundation would be sufficient, as that is the first step listed. (Exhibit H.2). That, however, would be contrary to the text and context of the Code. So too would an interpretation that excavation constitutes construction, as outlined above.

The only actions that occurred prior to September 11, 2019 were, at most, excavation of the foundation, and, as Appellant asserted at the hearing, running certain utilities to the home site.[2] Those actions do not constitute "actual construction of the foundation or frame" because they do not involve putting parts together to form the foundation or frame. In addition, as explained on page 9 of the Staff Report, the actions that would constitute actual construction would have required a building permit, and none has been issued. In sum, even if the four-year expiration period applied, the Permit expired on September 11, 2019 because the Appellant did not commence construction by that date.

III. The Hearings Officer does not have authority to decide equitable claims where not expressly granted that authority by state law or County Code. Even if the Hearings Officer had that authority, the Appellant has not established the elements necessary for an equitable estoppel claim.

The Appellant asserts that the County should be estopped from asserting that the Permit is expired because the Appellant believed, based on County staff's statements, that he had timely commenced construction within a four-year expiration period. The Hearings Officer lacks authority to decide that claim, and even if the Hearings Officer has equitable authority, the Appellant has not established a claim for equitable estoppel.

A. State law and County Code do not grant the Hearings Officer authority to decide this matter based on equitable doctrines.

The Hearings Officer's authority stems from state law and County Code. Under ORS 215.406(1), the County governing body may appoint hearings officers to "conduct hearings on applications for such classes of permits and contested cases as the county governing body designates." *See also* MCC 39.1800 (restating standard). Nothing in state statute or County

[22] The Appellant's evidence that more than grading occurred is contradicted by the invoice the Appellant offered to show that excavation had occurred. That invoice is for "Lot Grading" including work to "Grade berm, courtyard, basement," and makes no reference to excavation. (Exhibit 12 in Exhibit H.1).

Code contemplates that the Hearings Officer will decide equitable claims when reviewing issues relating to permit applications and expiration.

In fact, both state law and County Code require that all testimony and evidence submitted be directed toward the applicable criteria, which suggests that decisions must be made based on those criteria and not on equitable considerations. ORS 197.763(5)(b) (requiring hearing statement that testimony, arguments and evidence must be directed toward the criteria); MCC 39.1140(E)(3) (same). In the context of permit applications, ORS 215.416(8)(a) requires that approval or denial "be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county." *See also* MCC 39.1125 (application can be approved only if it meets the applicable approval criteria). Although a determination that a permit has expired is not approval or denial of a permit application, there is no indication in the statutes or the Code that the legislature or the County intended to provide broader authority to consider equitable claims in the expiration context, particularly where the Code provides that expiration is automatic. (Exhibit B.1, MCC 37.0690(D)).

In fact, if the Hearings Officer made a decision contrary to the plain text of the Code based on equitable principles, such as applying the four-year expiration period in this case, a party could appeal that decision to LUBA. Such a decision would be "not in compliance with applicable provisions of the comprehensive plan or land use regulations" and therefore subject to reversal or remand. ORS 197.835(8).

Notably, LUBA has relied on similar reasoning to conclude, to date, that it does not have authority to hear equitable claims. LUBA has explained that it is "an administrative agency, part of the executive branch, and entirely a creature of statute." *McDougal Brothers Inc. v. Lane County*, 2021 WL 1861192 at *7 (LUBA Nos. 2020-046/047/048/049, April 13, 2021). As a

result, LUBA has stated that its review authority "is prescribed, and limited, by those statutes" and has noted that "no party has advanced a remotely convincing argument that LUBA has that [equitable] authority." *Id.* Indeed, LUBA has explained that nothing in its governing statutes suggests that it has authority "to reverse or remand a decision based on equitable doctrines that, traditionally, only Courts have authority to apply." *Id.* The same reasoning applies to the Hearings Officer's authority.

However, like LUBA, the Hearings Officer need not decide whether he has equitable authority because the Appellant has not established the elements of equitable estoppel.

B. Staff did not make misrepresentations of material fact on which the Appellant reasonably relied, and even if they did, equitable estoppel cannot operate to waive mandatory requirements of an ordinance.

Equitable estoppel "should be applied cautiously" against the government and should be applied only in "rare" instances. *Mannelin v. DMV*, 176 Or App 9, 13, 31 P3d 438 (2001), *aff'd by an equally divided court*, 336 Or 147, 82 P3d 162 (2003) (quoting *Employment Division v. Western Graphics Corp.*, 76 Or App 608, 612, 710 P2d 788 (1985)).

A claim of equitable estoppel requires, as a starting point, a false statement of "existing material fact and not of intention, nor may it be a conclusion from facts or a conclusion of law." *Coos County v. State of Oregon*, 303 Or 173, 181, 734 P2d 1348 (1987). In addition, the Appellant must show "not only reliance, but a right to rely upon the representation of the estopped party." *Id.*

Here, as the apparent false statement of existing material fact, the Appellant points to emails from 2018 and 2019 where a staff planner stated, "[H]ope everything is going well with the construction," and "I have also received notice that you have begun work on your single-family dwelling again." (Exhibit H.1, page 7). The Appellant also points to issuance of the Grading and Erosion Control permit.

The statement "hope everything is going well with the construction" is a statement of intention, at most, but it is not a false statement of existing material fact. To the extent that the Appellant is arguing that the reference to "construction" is a false statement of material fact because the Appellant had not, in fact, satisfied the "commencement of construction" standard, that argument is unavailing. Even if staff's statement could be construed as a determination that the Appellant had met the "commencement of construction" standard – which it cannot – such a determination would, at a minimum, be a conclusion from facts or, more likely, a conclusion of law. As noted above, neither a conclusion from facts nor a conclusion of law is subject to the estoppel doctrine.

The statement, "I have also received notice that you have begun work on your single-family dwelling again," though perhaps a statement of fact, has not been shown to be a false statement of material fact, *i.e.*, the Appellant has not shown that staff did not actually receive the notice described. Though the Appellant may have drawn a conclusion from that statement of fact, that does not make the statement itself false or subject to a claim of equitable estoppel.

As to the issuance of the Grading and Erosion Control permit and sign off on Building Plan Review in February 2018, the Appellant has not pointed to any false statement of material fact in those approvals. At most, what the Appellant appears to have inferred from those actions – that the Permit was still valid – would be a conclusion from facts or a conclusion of law, not a false statement of material fact. Importantly, the courts have held that a false statement of material fact is what is required; a mere inference to be drawn from statements or actions is not enough. *Mannelin*, 176 Or App at 13 n 4 (noting that case law has "categorically, and repeatedly, require[d] a misstatement of existing material fact").

What's more, both staff's statements and the approvals were made after the September 11, 2017 expiration deadline, so the Appellant cannot point to those statements or approvals to estop the County from applying that deadline or from applying its interpretation of "commencement of construction." Because the statements were made and the approvals were issued after the deadline, the Appellant could not have relied on those statements or acts as a basis for not commencing construction within the two-year expiration period.

Finally, even if the Appellant could show reasonable reliance on a false statement of material fact, "the mandatory requirements of an ordinance specifically stated cannot be waived" and a government cannot "be estopped by the acts of a [government] official who purports to waive the provisions of a mandatory ordinance or otherwise exceeds his authority." *Bankus v. City of Brookings*, 252 Or 257, 260, 449 P2d 646 (1969); *see also Mannelin*, 176 Or App at 15 ("[A]n agency's representations cannot, through estoppel, force the agency to act contrary to statute.").[3] Here, the two-year expiration period is expressly set forth in mandatory terms in MCC 37.0690, which states that a permit "shall expire * * * [w]hen construction has not commenced within two years of the date of the final decision." (Exhibit B.1, MCC 37.0690(B)(1)). Relatedly, MCC 37.0690(D) provides that expiration is automatic. Staff does not have authority to waive the mandatory expiration period and, particularly after the permit has expired, staff's statements cannot revive a permit that has automatically expired. The only email that expressly cited to the four-year expiration period was sent after both the two-year and four-year periods expired, meaning the Appellant cannot show that reliance on that email caused him to miss his deadline.

[3] The Hearings Officer asked about *Loosli v. City of Salem*, 345 Or 303, 193 P3d 623 (2008) as it relates to the ability of applicants to rely on staff statements. Although that case has been cited on that issue, the case arose on different facts, involving a negligence claim based on incorrect information a planner gave in a DMV certification process. The court denied the claim based on its conclusion that the city did not owe a duty to the applicant.

C. Even if the County is estopped from applying the two-year expiration period, the Appellant failed to commence construction within the four-year expiration period.

As explained above in Section II.C, under the plain meaning of the Code, "commencement of construction" requires more than excavation of the foundation; parts of the foundation must actually be put together. The evidence shows that the only step that was taken on the foundation prior to September 11, 2019 was, at most, excavation, which does not constitute actual construction. Therefore, even under the four-year expiration period, the Permit has expired.

IV. The expiration provisions in OAR 660-033-0140 are not directly applicable because the County's Code is acknowledged.

The Appellant argues that the Hearings Officer should find that the Permit remains valid because the Appellant "initiated" its "development action" within the two-year period provided in OAR 660-033-0140. The Appellant argues that, to the extent the County's Code is narrower than the state rule, it violates the state rule and cannot be applied. The Appellant is incorrect.

LUBA rejected a similar argument in *Gould v Deschutes County*, 67 Or LUBA 1 (2013), *aff'd without opinion*, 256 Or App 520, 301 P3d 978 (2013). There, the petitioner argued that the county should have applied OAR 660-033-0140 rather than the similar, but different, and "arguably inconsistent," expiration standard in county code. *Id.* at 7-8. LUBA affirmed the Hearings Officer's determination that the county code applied and the state rule did not apply because the county's comprehensive plan and land use regulations had been acknowledged. *Id.* at 8. In support, LUBA cited *Byrd v. Stringer*, 295 Or 311, 318-19, 666 P2d 1332 (1983): "[O]nce acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances." *Gould*, 67 Or LUBA at 8 (quoting *Byrd*). The same reasoning applies here – even if the County's Code is

inconsistent with the expiration provisions in OAR 660-033-0140, because the Code is acknowledged, the Hearings Officer must apply the standard set forth in MCC 37.0690.[4] *See attached* Exhibit 1 (showing acknowledgment of Chapter 39, which includes MCC 37.0690 renumbered as MCC 39.1185, adopted by Ordinance No. 1264 *available at* https://multco-web7-psh-files-usw2.s3-us-west-2.amazonaws.com/s3fs-public/1264.pdf).

V. The vested rights doctrine does not apply because there has been no change in the zoning code.

As explained in the Staff Report, the vested rights doctrine does not apply when there has been no change in the zoning code. The purpose of the vested rights doctrine is to provide relief for property owners who "commence[] construction of a lawful use" and "reach[] a certain stage of good faith investment" before "subsequent adoption of zoning amendments that restrict or prohibit development." *Heidgerken v. Marion County*, 35 Or LUBA 313, 317 (1998).

Here, there has been no "subsequent adoption of zoning amendments that restrict or prohibit development" – indeed, in relevant part, there has been no change to MCC 37.0690 at all since issuance of the Permit. As a result, the Appellant had notice from the date the Permit was issued that MCC 37.0690 provided for a two-year expiration period.

The Appellant attempts to distinguish *Heidgerken* by arguing that here, the Appellant was induced to believe that the Permit was still valid when he undertook the work on the property. That argument, however, is more appropriate for an estoppel claim than a vested rights claim. A vested rights claim must be based on lawful work undertaken prior to some change in the zoning law, not based on work undertaken based on staff references to construction occurring.

[4] The Appellant's argument also fails under traditional preemption principles because it is possible to comply with both the Code and state law; in other words, compliance with the Code does not require the Appellant to violate state law, and therefore is not preempted. *See Rogue Valley Sewer Services. v. City of Phoenix*, 357 Or 437, 455, 353 P3d 581 (2015) (quoting *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650 (2010), *rev den*, 348 Or 524 (2010)) ("[A] local law is preempted only to the extent that it 'cannot operate concurrently' with state law, *i.e.*, the operation of local law makes it impossible to comply with a state statute").

In response to that fact, the Appellant also argues that the staff's changing interpretations constituted the requisite change in law for vested rights purposes. There is no case law to support that approach; as explained above, staff do not have the ability to change the law by email, meaning there was in fact no change in the law in this case. Moreover, contrary to the Appellant's assertions, the applicant in *Heidgerken* made a similar argument. There, the applicants argued that for 14 years, the county had granted extensions on the applicant's permit, and the applicant continued to make improvements on the property pursuant to those extensions with the belief that future extensions would be granted under the same standards. *Id.* at 316, 322-23. However, in year 14, the county denied the extension without any apparent change in circumstances. *Id.* at 316, 323. The county's change in its application of its extension provisions after 14 years in *Heidgerken* is a larger shift than the County's correction of a misstatement in a staff email here. *Heidgerken* is controlling and, under *Heidgerken*, the vested rights doctrine does not apply.

Moreover, in arguing that the doctrine does apply, it is not clear what action or statement the Appellant is asserting constitutes a "subsequent adoption of zoning amendments that restrict or prohibit development" or when the Appellant is asserting such an amendment occurred. That fact is important because generally the court will consider only those actions undertaken prior to a zoning amendment for purposes of the vested rights doctrine. *Friends of Yamhill County v. Board of Commissioners*, 351 Or 219, 241, 264 P3d 1265 (2011) ("The effective date of a zoning change is ordinarily the date as of which vested rights are determined[.]"). As a result, without that base premise, it is difficult to respond to the Appellant's argument. It is also unclear how the Appellant would apply the factor of "whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements" because the Appellant had notice of the

two-year expiration period through the plain text of MCC 37.0690, cited in the Permit. It is also not clear whether the expenditures so far cited "could apply to various other uses of land." Because the Appellant has not distinguished *Heidgerken*, and because the vested rights argument is not fully developed, the Hearings Officer should conclude that the Appellant has not established a vested right to complete the dwelling.

VI. The amendments to ORS 197.307(4) do not apply to the current proceeding, and even if they did, the standard is clear and objective.

Prior to 2017, ORS 197.307(4) required local governments to apply "clear and objective standards" to "needed housing on buildable land." ORS 197.307 (2016). The definition of "needed housing" in ORS 197.303(1) was limited to housing "determined to meet the need shown for housing within an urban growth boundary." ORS 197.303 (2016).

However, Senate Bill (SB) 1051 (2017) expanded the reach of ORS 197.307(4) by providing that "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing." SB 1051 § 5 (2017), *available at* https://olis.oregonlegislature.gov/liz/2017R1/Downloads/MeasureDocument/SB1051. As is often the case with land use legislation, in light of the goal post rule, the legislature expressly provided that the expanded reach of SB 1051 would apply only to permit applications filed after the effective date of the legislation. Section 13 of SB 1051 states: "[T]he amendments to ORS * * * 197.307 * * * by section[] * * * 5 * * * of this 2017 Act apply to permit applications submitted for review on or after the effective date of this 2017 Act [August 15, 2017]." SB 1051 (2017). Here, the relevant permit application is the application for the dwelling, which was "submitted for review" prior to 2017. As a result, the amendments expanding the reach of ORS 197.307(4) do not apply to this case.

At hearing, the Appellant suggested that, despite Section 13, the amendments in SB 1051 apply to the current proceeding because ORS 197.307(4) covers not only the adoption of clear and objective standards, but also the application of those standards. The Appellant also stated that because the County's application of the two-year expiration period only became known to him in the Staff Report before the Hearings Officer, the County had "adopted" a new Code provision following the effective date of the 2017 legislation. Both arguments are unavailing.

The plain text of the amendment provides that it applies only to "permit applications submitted for review" after the effective date of the legislation. In other words, the applicability of the legislation turns on when the relevant permit application was submitted, not on the time at which the local government regulation was "adopted" or "applied." Here, the permit application for the dwelling was submitted prior to 2017, so the legislation does not apply to County regulations that are applied to that permit application, regardless of when those County regulations were adopted or applied.

Moreover, even if the amendments in SB 1051 (2017) were applicable, the expiration provision is clear and objective. As LUBA has explained, "the fact that a term requires some level of interpretation does not make it not 'clear and objective.'" *Roberts v. City of Cannon Beach*, 2021 WL 3542268, at *10 (LUBA No. 2020-116, July 23, 2021, slip op at 24). For example, LUBA has found a standard to be clear and objective where a local government relied on a dictionary definition to interpret its code in a clear and objective way. *Id.* at *8, slip op at 20-21 (citing *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012)). In addition, even if a term in insolation might be subject to multiple interpretations, that same term may be considered clear and objective if its context makes the meaning clear. *Id.* at *12, slip op at 28 ("Even if the term 'buildable' in isolation might be

subject to multiple interpretations, in the context of the operation of the oceanfront setback, it is clear that 'buildable' means that the lot qualifies for the construction of a residential or commercial structure."). Moreover, the Appellant has not cited support for the assertion that a staff statement made in error demonstrates that a standard is not "clear and objective."

Here, both the expiration period and the standard for expiration are clear and objective. As to the expiration period, MCC 37.0690(C)(4) expressly lists the types of dwellings that are subject to the four-year expiration period, and the type of dwelling approved in the Permit is not on that list and therefore is subject to the two-year expiration period in MCC 37.0690(B).

As to the standard for expiration, MCC 37.0690(B) requires "commencement of construction," meaning "actual construction of the foundation or frame of the approved structure," "within two years of the date of the final decision." (Exhibit B.1). As explained above, both the text and context of that provision make clear that a permittee must begin putting together the parts of the foundation to satisfy that standard. Read in context, there is no question that grading and excavation are insufficient to satisfy that standard. Therefore, the standard is "clear and objective" under the case law described above.

CONCLUSION

For the reasons set forth in the Staff Report, at hearing, and above, the County requests that the Hearings Officer affirm the Planning Director's decision that the Permit is expired.