EXHIBIT
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VIA E-MAIL

Mr. Joe Turner
Municipal Hearings Official
30439 S.E. Jackson Road, Suite 200
Gresham, OR 97080

RE: Scott and Stacey Reed Farm Dwelling (T2-2021-14768);
Applicants'/Appellants' Final Written Argument

Dear Mr. Turner:

As you know, this office represents Scott and Stacy Reed (the "Reeds"), applicant/appellants in the above-captioned appeal. The Reeds submitted a letter explaining their legal argument on appeal on September 7, 2021. The Hearings Officer held a public hearing on the appeal on September 10, 2021. After the hearing was closed, the County Counsel requested that the record be held open for an additional week to submit "post hearing briefing." The Hearings Officer therefore held the record open until September 17 for any party to offer new argument and evidence, until September 24 for any party to offer responsive evidence and argument, and until October 1 for the Applicant to submit final written argument.

The following letter constitutes the Reeds' final written argument in this matter. It contains no new evidence but appends photographs and a letter already in the record. This letter primarily addresses the Reeds' primary arguments they raised in the appeal. First, under *Holland v. Cannon Beach*, the County may not retroactively change its interpretation of MCC 37.0690(B) to impose a deadline of September 11, 2017 for the Reeds to "commence construction," after having interpreted and applied that same section for six years as imposing a deadline of September 11, 2019. Second, the evidence in the record demonstrates that the Reeds "commenced construction" prior to both dates.

1. The County's recent finding that the Land Use Permit expired on September 11, 2017 is precluded by *Holland v. Cannon Beach*.

As the Reeds explained in their September 8 letter, the court in Holland sought to draw a line between allowable local government inconsistencies[1] and "inconsistent or arbitrary local

[1] The court mused that there might be "tenable alternative interpretations that differ from one another by 180 degrees, either of which would be equally affirmable." 154 Or. App. 450, 458.

interpretations, which result in unjustified selective or conflicting applications of local provisions." 154 Or. App. 450, 57.

Until shortly before the hearing on this Appeal, the County was consistent and uniform in its position, both implied and express, that the Reeds had four years to commence construction of their home.[2] This is exemplified not just by the County's express email explanation on June 11 explaining that Reeds' land use permit expired on September 11, 2019. It was also reinforced at every turn by the actions taken by the County, including the email correspondence detailed in the Reeds' September 9, 2021 letter to the Hearings Officer, which is enclosed as **Exhibit 1**. The County did more than just fail to apply a September 11, 2017 deadline; it actively approved permits associated with home construction after that date. This included approval of the Reeds' construction plans and grading permit no. T1-2017-9729, both of which approvals were issued in 2018.[3]

The County makes much of the "ratification" of the interpretation in *Holland* by the city council. However, the court in *Holland* never created a ratification *requirement*, it only cited the city's ratification as support of its opinion. Even if the court had done so, ratification of LUD staff's application of a four-year deadline by the County governing body was not possible in this case as a procedural matter. However, ratification did occur: the County approved the building plans for the Reed home and approved a grading permit for construction of the home *after* the two-year deadline the County is now seeking to apply, and the County did not attempt to stop pendency of the building permit until nearly five years had passed since the Reeds' land use permit was approved.

Under ORS 215.427(3) (the "fixed goal-post rule" —the county analogue to ORS 227.178(3)), the County is specifically precluded from changing the standards applicable to a land use decision. *Holland* merely applies that statute and its interpretive case law to *how* and *whether* local governments apply those standards. This was well explained by LUBA in *Gangier v. City of Gladstone,* 38 Or LUBA 858, 864–65 (2000):

> "The purpose of ORS 227.178(3) is to assure that 'the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings.' *Davenport v. City of Tigard*, 121 Or. App. 135, 141, 854 P2d 483 (1993); *see also Holland v. City of Cannon Beach*, 154 Or. App. 450, 458, 962 P2d 701, rev den 328 Or 115 (1998) (city cannot circumvent ORS 227.178(3) by changing its

[2] Whether the County's interpretation was express is immaterial because both LUBA and the Court of Appeals have firmly held that local government interpretations can be inferred by *how* a given standard or ordinance is applied. *See, e.g.*, *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613, 617–18 (1997); *Alliance for Responsible Land Use v. Deschutes County*, 149 Or. App. 259, 266–67 (1997).

[3] As explained in the Reeds' September 8 letter, County staff also indicated by writing that the Reeds had started construction prior to changing that opinion.

> interpretation of which standards apply during the course of the proceedings). […] ORS 227.178(3) implicitly requires that the city apply a consistent set of standards to the discretionary approval of that development in construction of that development […]."

The County's arguments regarding *Holland v. Cannon Beach* focus entirely on the theoretical exceptions to the rule, which the County would have swallow the rule itself. *Holland* does not allow, as a general matter, the County to "correct the one misstatement Staff did make," as the County argues. In fact, Holland only accepts such a premise as an "abstract proposition" and does not explain in what instances a local can government can make such a correction.

However, *Holland* carefully qualifies even that limited "abstract proposition" with the sentence immediately following it: "However, where ORS 227.178(3)[4] applies, its emphasis is on consistency, not correctness." *Id*. 154 Or. App. at 459. *Holland* did not limit itself only to *correct* applications of law; indeed, in that case the court took no position on that issue. If it had, *Holland* would have established a rule that only the "correct" interpretation of a land use regulation may control, which would have arguably allowed a local government to "correct" an incorrect application of its land use regulations at any time. However, *Holland* did not do that, and the above-quoted excerpt demonstrates that the court was concerned first and foremost with preserving the consistency in how local governments apply their standards, whether correct or not. Thus, it is irrelevant to this case which of the County's inconsistent interpretations of MCC 37.0695 is correct as a matter of law.

At any rate, the County's portrayal of LUD's staffs' course of dealing and is alleged "misstatement" is artful, at best. We are not talking about just one staff misstatement: we are talking about nearly five years of active progress between the Reeds and LUD staff towards obtaining a final permit approval from the City of Portland, with significant correspondence between them, none of which suggested that the Reeds had not vested their Land Use Permit within the allotted time and all of which indicates that the Reeds had at least four years to do so. It is true that the County's approach to the Reeds has become more restrictive over the last two years, but *Holland* and ORS 215.427(3) clearly prohibit post-hoc legal epiphanies from altering, to an applicant's detriment, the legal positions the County had consistently taken throughout the permitting process.

In the full analysis, the facts demonstrate that the LUD never applied a two-year deadline on the Reeds' land use permit. It repeatedly applied a four-year deadline, which was ratified by subsequent permitting decision of the County itself. The County's recent decision to retroactively apply a two-year validity period to the Reeds' land use permit—nearly six years after the Reeds obtained their land use permit—plainly violates the doctrine articulated in *Holland v. Cannon Beach*.

[4] There is no dispute that the County analogue to ORS 197.178(3) is ORS 215.427(3) applies to the Reeds' Land Use Permit.

2. The record is clear that the Applicant had "commenced construction" prior to September 11, 2017 and within the four-year deadline originally applied by the County.

The record is clear that the Reeds (1) obtained a grading permit specifically to excavate the foundation of their home and (2) that they actually did so. This evidence is reinforced by the photographs provided by the Reeds during the first open record period, which demonstrates the following:

- The Reeds installed water and power to their home site in February 2014. **Exhibit 2.**
- The Reeds began grading and excavation of their foundation by at least May 29, 2017. **Exhibit 3**.
- The Reeds did their initial basement foundation layout and began excavation of that layout by June 10, 2017. **Exhibit 4**.
- The Reeds completed excavation of their foundation and basement by October 2, 2018. **Exhibit 5**.

In the Staff Report, County staff argued that under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993), "words of common usage typically should be given their plain, natural and ordinary meaning." We agree. As explained in the letter from BDZE Construction (**Exhibit 6**), submitted by the Reeds prior to the hearing, is substantial evidence of what the plain meaning of "commence construction" is. That letter explains that that first step in construction of a foundation is to "physically layout the foundation, footings and/or basement on the site with stakes and/or markings." The second step is to "excavate the foundation, footings and/or basement to required depths." Thus, the "ordinary" meaning of the phrase "commence construction" of a foundation supports a finding that the Reeds' layout of the foundation and actually excavating the foundation, both before and after September 11, 2017, satisfied MCC 37.0690(B).

In its first open record memorandum, the County changed tactics to argue for a much more restrictive meaning of "commence construction." For example, the County cites to terms in the MCC pertaining to utility and road construction as commencing with the "actual excavation of tranches" and "actual grading of the roadway" as sufficient to "commence construction" for those projects.[5] However, those definitions do not prove the point the County attempts to make; in contrast, the Reeds did far more than "actual grading" or the "actual excavation of trenches": they hired a surveyor to lay out their foundation, built a road to it, installed electrical and water service, prepared stable grades around the foundation, and fully excavated the foundation. The

[5] Note that in both cases, the act of merely "excavating" or "grading" of those facilities would not satisfy the County's belief that "construction" must mean the "act of putting parts together to form a complete integrated object."

simple thread that ties together these definitions of "commence construction" is that in each instance, they go beyond mere preparation and represent a bona fide effort to begin a project.

As explained in the Reeds' September 7 letter to the Hearings Officer, the word "construction," when used in the context of MCC 37.0690, is a use of the transitive form of the verb "construct," which means to "form, make, or create by combining parts or elements." Webster's Third Int'l Dictionary (1981 Ed.). The County does not appear to dispute that excavation of the foundation is an essential component of "forming" or "making" the foundation. The dictionary definition of "construction" cited by the County does not compel the County's interpretation, and given the way excavation is apparently "construction" for other types of projects listed in MCC 37.0690(B)(1) (such as for roads and utilities), the County's position makes little sense.

An important element to the phrase "commence construction" that undermines the County's interpretation is the way in which the word "commence" modifies the word "construction." In fact, the County's illustration of the dictionary definition of the word "construction" appears to ignore the word "commence" entirely. That is, even if the word "construction" means to "put parts together," the act of constructing must necessarily *start* somewhere—hence, the County's use of the word "commence." In this instance, the Reeds had authorization to build their home, and they *commenced* construction of their home not just by grading, but by laying out the dimensions of the basement and foundation, and excavating and shaping the ground that would support the rest of their home. This is all the more true of the Reeds' "commencement" of construction of their foundation.

Assuming that the Hearings Officer adopts a "plain, natural and ordinary meaning" of the phrases "commence construction" and "actual construction of the foundation or frame," the Hearings Officer can find that the Reeds began "actual construction of the foundation" when they conducted the initial layout of the foundation in May and June of 2017, as reflected in the photographic evidence. And, there is no dispute that the Reeds had completed excavation of their foundation by October of 2018.

The County's second open record period response argues that the Reeds would have committed a code violation by "commencing construction" prior to obtaining their grading permit, and by implication, would have committed a code violation by "commencing construction" prior to September 11, 2021. Putting aside the Kafkaesque implications that the Reeds could not have, as a legal matter, "commenced construction" of their home within the period in which the County claims their Land Use Permit was valid, the County is simply wrong that one cannot "commence construction" for purposes of a Land Use Permit unless one has a valid building permit. This is for the simple reason that the County does not include such a requirement in MCC 37.0690—all a permittee must do to vest its land use permit approval is to "commence construction."

Presumably, one that commences construction before obtaining a required permit risks some kind of enforcement action. However, taking such a risk does not mean one is not "commencing construction" as defined by MCC 37.0690(C). Thus, the County's speculation about the various sanctions it would be entitled to bring against the Reeds for commencing construction prior to obtaining a building permit is simply irrelevant to the question of whether the Reeds had

"commenced construction" as that term is defined in the MCC. To read requirements for permit approvals into MCC 37.0690(B) and (C) calls for an egregious judicial insertion of language into that ordinance, in plain violation of ORS 174.010.[6] But it also ignores the reality that many people in Oregon, and many in Multnomah County, undertake work that is not permitted—the lack of a permit does not mean that the work is not undertaken.

3. The Hearings Officer can find that OAR 660-033-0140 applies to the County's decision on permit expiration and extension.

As the Reeds pointed out in their September 8 letter, that the County's specific requirements that a permittee "commence construction" are at odds with OAR 660-033-0140's use of the phrase "initiate a development action":

> "Assuming that the County's decision to use "commence construction" instead of the OAR's terms "initiate" a "development action" was intended to reduce the universe of actions a landowner may take to initiate a development action, it did so in violation of OAR 660-033-0140, and it may not now apply its definition of "commence construction." In the absence of a contrary definition in the OARs, MCC, or any other applicable law, the Hearings Officer can find that the Reeds "initiated" their development action by submitting their building plans for the County's review and applying for a grading permit for their home prior to September 11, 2017. On the same token, the Hearings Officer can find that those same actions, coupled with the County's approval of the Reeds' building plans and their grading permit, coupled with actual grading and foundation construction, clearly demonstrate that they had "initiated" their "development action" prior to September 11, 2019."

The County responds in its first open record period memo that the County is not required to conform its extension decisions to OAR 660-033-0140, pursuant to LUBA's holding in *Gould v. Deschutes County*, 67 Or LUBA 1 (2013). However, to the extent that LUBA articulated a premise that OAR 660-033-0140 was not applicable simply because the County had its own acknowledged, parallel extension ordinances governing exclusive farm use zone, that premise is undermined, in whole or in part, by the Court of Appeals decision in *Jones v. Douglas County*, 247 Or. App. 81 (2011).

In *Jones*, the Court held that where OAR 660-033-0140 was the source of the county's authority to issue extensions under that section, it is directly applicable to such decisions. According to the court "[t]hat is so even though the county erroneously exercised that authority by granting untimely extension requests in contravention of the requirements of the rule." Id. 247 Or. App. at 94. The court held that OAR 600-033-0140 was the source of such authority, in part because

[6] "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

LUBA found that the Douglas County had adopted roughly identical provisions into its own code. 63 Or LUBA 261, 266. This is so with Multnomah County, as revealed by a comparison between MCC 37.0690 with OAR 660-033-0140.

Gould appears to turn on a recognition that Deschutes County regulations that were apparently so different from OAR 660-033-0140 that the act of acknowledgment itself could protect them from arguably contrary LCDC rules. The court in *Jones* had took the opposite approach and directly applied the standards of OAR 660-033-0140. Given that *Jones* originated from a higher court than did *Gould,* the Hearings Officer can find OAR 660-033-0140 to be relevant here. Even if it were necessary (or possible) to reconcile the two, *Jones* at least stands for the premise that OAR 660-033-0140 applies when local governments incorporate roughly identical standards into their land use regulations, as is the case here. *See, e.g. McLaughlin v. Douglas County*, 76 Or LUBA 77, 81 (2017).

As OAR 660-033-0140 is the apparent source of authority for the County's own expiration and extension regulations, the Hearings Officer should find that Reeds "initiated" their "development action" within that timeframe, and their Land Use Permit remains valid accordingly.

4. Conclusion.

As evident from the facts in the record and the Reeds' testimony during the hearing, County LUD staff has put the Reeds into an extremely difficult (and arguably impossible) position. They did so by repeatedly assuring the Reeds, both explicitly and impliedly, that the Land Use Permit remained valid while the Reeds spent vast sums of money and time to commence construction and obtain a building permit, only to then pull the rug out from under the Reeds years later once they decided that the Reeds had not, in fact, "commenced construction." The County now attempts to drive in the stake further with its post-hoc position that, contrary the all indications made by the County over the course of six years, the Reeds in fact had only two years to vest their permit. All of this, after the Reeds had to sue the County in circuit court to obtain their Land Use Permit in the first place.

The Reeds are understandably suspect of the County's motives. But regardless of those motives, ORS 215.427(3) and the doctrine established in *Holland v. Cannon Beach* provide that the County may not reverse course as it has done here. Moreover, the record demonstrates that the Reeds "commenced construction" of their home prior to September 11, 2017 and certainly prior to September 11, 2019, and as such, have the right to complete their home.

For the above reasons, as well as those in the Reeds' prior written and oral testimony, the Reeds respectfully request that the Hearings Officer grant the appeal.

Best regards,

Garrett H. Stephenson

GST:jmhi
Enclosures

cc: Mr. Scott L. Reed CRE, CCIM, LEED *(via email) (w/enclosures)*

PDX\131873\255993\GST\31876214.1

September 8, 2021

VIA E-MAIL

Land Use Hearings Officer
Multnomah County Land Use Planning Division
1600 SE 190th Avenue
Portland, OR 97233

RE: Appellant Statement regarding Scott and Stacy Reed Farm Dwelling (T2-2021-14768)

Dear Land Use Hearings Officer:

This office represents Scott and Stacy Reed (the "Reeds"), appellants in the above-captioned appeal. This letter further explains the Reeds' legal bases for their appeal and responds to the September 3, 2021 Staff Report. Due to the County's changed interpretation regarding the date that the County believes the Reeds' farm dwelling permit to have expired, this letter offers additional bases for reversal of the County's finding that the permit has expired. This letter is timely submitted prior to the *de novo* hearing on September 10, 2021.

1. Summary of Arguments

a. The County unambiguously interpreted the MCC for nearly six years to provide the Reeds four years to "commence construction" of their home. The County may not offer a new and inconsistent interpretation for the first time in this appeal.

b. The County already found that the Reeds had "commenced construction" in staff statements made prior to September 11, 2019 that they hoped "everything is going well with construction" and that the Reeds had "begun work on their single-family dwelling again."

c. The Reeds in fact "commenced construction" within the County's chosen deadline.

d. Regardless of whether the Reeds' "commenced construction," they satisfied OAR 660-033-0140's requirement that they "initiate" their "development action" prior to their permit expiration date.

e. The County's decision should be barred by equitable estoppel.

f. The Reeds have a vested right to complete their home.

g. The County's decision is prohibited by ORS 197.307(4).

2. Relevant Facts.

In 2015, the Reeds obtained a land use permit for a "dwelling customarily provided in conjunction with a farm use on non-high- value soils, capable of producing the median level of annual gross sales" (Multnomah County Casefile T2-2014-3377) (the "Land Use Permit."). **Exhibit 1**. They were able to do so only after being forced to sue the County in Circuit Court after County Planning staff failed to meet its 150-day decision deadline by several months. This cost the Reeds over $40,000 in legal fees, in addition to the costs necessary to prepare and file the permit application; nonetheless, the Reeds agreed not to seek attorney fees from the County in return for the County's agreement to not further delay issuing the land use permit. Accordingly, the County did so on September 11, 2015. The Land Use Permit allows a single-family home, driveway, and related improvements. Since the Land Use Permit issued, the Reeds have made substantial improvements to the property in accordance with the permit, including site grading and excavation of the home's foundation.

In the Reeds' part of Multnomah County, building permits are issued by the City of Portland, although the County still requires building permit applicants to submit a plan set for review by the Land Use Planning Division (the "LUD"). To our knowledge, the LUD did not have staff tasked with (or qualified for) reviewing structural or building permit plans; the purpose of submitting the plan set was entirely to ensure that the proposed dwelling is within the parameters established in the Land Use Permit. After obtaining their land use approval, the Reeds submitted house plans to the County for the required review by at least the spring of 2017, as demonstrated by the fact that they were actively under review by Mr. Rithy Khut on June 14, 2017. **Exhibit 2**.

Despite not being tasked with reviewing and approving a building permit application, the LUD seemed to find new structural requirements at every turn—in many cases these requirements' connection to any land use regulation were theoretical, at best. For example, the LUD initially required a sign-off on the Reeds' plans for fire/life safety from Tualatin Valley Fire and Rescue; once the Reeds provided this, the LUD then decided it needed a stamped fire sprinkler plan. **Exhibit 2**. For another example, the LUD required a minor change in the site plan requiring the house to be closer to Springville Road. When the Reeds complied with that requirement, the County required a consolidation of their parcels because the proposed home now straddled a property line. **Exhibit 3**.

The point of the above discussion is that LUD staff has repeatedly made a hash of the Reeds' project. Unlike in land use reviews, there is no state-mandated deadline on building permit reviews. As a result of the County's delays, the Reeds did not obtain County approval of their building plans until February 2018. The Reeds submitted their building permit application to the City of Portland on February 20, 2018, which began its review on March 27, 2018. **Exhibit 4**.

The Reeds did what they could to start construction while their plans were under review. On August 8, 2017, the Reeds applied for a grading and erosion control permit, which the County did not issue until February 14, 2018. T1-2017-9729, **Exhibit 5**. The Reeds engaged Nichols Excavation to dig their foundation, which work was completed in September 2018. **Exhibit 6**.

The Reeds believed that upon digging the foundation they had started building their home, and so did LUD staff. An email discussing work being done under the grading permit was sent by Mr. Khut to Mr. Reed on August 1, 2018, in which Mr. Khut said "hope everything is going well with the construction and permitting at the City of Portland." **Exhibit 7**. The following year, Mr. Khut sent an email dated May 9, 2019 to the Reeds explaining that "I have also received notice that you have begun work on your single-family dwelling again." **Exhibit 8**. Thus, the Reeds had every reason to be confident that they had indeed "commenced construction" with the foundation work proceeding under the grading permit. What is more, if the Reeds did not believe they had "commenced construction" then they would have applied for an extension of time allowed in the Land Use Permit.

The Reeds continued what work they could do and the City continued its review until April 23, 2020, when it received an administrative hold order from County staff on June 2, 2020. The County apparently never told the Reeds in the first instance that it had determined that their Land Use Permit expired; instead, notice to the Reeds came as an obscure note placed into the City's permitting files. On June 11, 2020, Mr. Khut sent an email to Scott Reed explaining that the Land Use Permit was subject to a four-year period of initial validity and that it was LUD's position that Mr. Reed's permit expired on September 11, 2019. **Exhibit 9**.

The Reeds appealed this decision but the County Planning Director refused to intake the appeal. **Exhibit 10**. On June 3, 2019, the County orally reaffirmed Mr. Khut's analysis during a phone call and followed that up a few days later stating "your permit in Case File T2-2014-3377 has expired under the terms of the permit for failure to commence construction within the required time period." This appeal followed.

3. The County should be bound to its prior conduct, interpretations, and June 20, 2020 decisions that (1) the Land Use Permit was valid for four years, until September 11, 2019 and (2), that the Reeds had already "commenced construction."

For nearly six years, the LUD maintained a position that the Reeds had four years to "commence construction" on their home. This is demonstrated by the two emails from Mr. Khut discussed above and evidenced by the fact that the LUD approved a grading permit for the Reeds' home site after September 11, 2017. Also, the LUD approved the Reeds' house plans for submittal to the City of Portland on February 12, 2018. On June 11, 2020, Mr. Khut unambiguously stated as follows:

> "The four year date as provided under (C)(1)(a) for the permit was September 11, 2019. Land Use Planning did not receive a written application requesting to extend the timeline of the permit as required by MCC 37.0695 (now renumbered to MCC 39.1195). As no extension was requested a new land use permit must be sought to authorize the dwelling."

The County Planning Director and County Counsel orally repeated this decision in a telephone call on June 3, 2019.

The first time the LUD took the position that the Land Use Permit expired on September 11, 2017 was in its staff report for this appeal, nearly six years after approval of the Land Use Permit. It did so after years of reviewing and approving building plans and grading plans for the new dwelling, and after expressly taking the position that the permit expired on September 11, 2019.

To say that this Kafkaesque behavior by LUD staff did and continues to do substantial harm to the Reeds, both financial and emotion, is understating the matter considerably. But right or wrong, the County has a made a series of land use decisions adopting September 11, 2019 as the expiration date of the Land Use Permit. These include the February 12, 2019 grading permit for "grading activities associated with a new single-family dwelling" and the LUD's June 11, 2020 email claiming that the permit expired September 11, 2019.

In *Holland v. City of Cannon Beach*, 154 Or App 450, 457 (1998), the Oregon Court of Appeals firmly held that that local governments cannot change their interpretation of applicable law during proceedings on the same case, which is exactly what the County seeks to do here. In *Holland*, the City of Cannon Beach found in 1994 that a density standard was not applicable to the petitioner's subdivision application. However, when the project was remanded from LUBA in 1997, the County reversed course and found that the petitioner's application could not be approved because it failed to satisfy the very density standards which the city previously found inapplicable. The Court made the following observation regarding the facts in *Holland*:

> "From the time of the city attorney's letter the year before petitioner filed his application through the time of the city council's Chapman Point decision the year after he applied, every person and body that had addressed the question at every level of the city government were uniform in the view that section 16.04.220(A) was inapplicable as an approval standard and, indeed, that it no longer existed." *Id*. 457.

The Court went on to find that, under the fixed goal-post rule stated in ORS 227.178(3)[1], local governments cannot change their positions on what standards and criteria apply to a project mid-stream. Quoting *Davenport v. City of Tigard*, 121 Or App 135, 141 (1993), the Court in *Holland* observed that "the purpose of ORS 227.178(3) "is to assure both proponents and

[1] A substantively identical rule applies to counties in ORS 215.427 (3).

opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings." *Holland*, 154 Or App at 458.

In short, the Hearings Officer should find that the County both impliedly and expressly took the position for nearly six years that the Reeds had four years to complete their home. The rule in *Holland* is clear that the County cannot now, six years later, adopt a different interpretation, especially given the substantial costs expended by the Reeds in furtherance of their project between 2017 and 2019. For these reasons, the Hearings Officer should find that the County is bound to its prior interpretation that the Reeds had four years to "commence construction."

For the same reasons and for the same points of law, the Hearings Office can and should find that Mr. Khut's repeated acknowledgments that the Reeds had begun construction and "begun work" on their farm dwelling constitute at least implied interpretations of the MCC that the County cannot now reverse.

4. The Reeds "commenced construction" within their permit deadline as that term is used in MCC § 37.0690(C).

MCC § 37.0690(C) (as now renumbered 39.1185(C)(1)) provides that permits are expired "when construction has not commenced within four years of the date of the final decision. Commencement of construction shall mean actual construction of the foundation or frame of the approved structure." As explained above, under this regulation, the Reeds had until September 11, 2019 to "commence construction." The term "actual construction" is not defined in the MCC. In interpreting a County ordinance, the Hearings Officer must first consider the text and context of the provision. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

Starting with the text, it is reasonably clear that the phrase "commencement of construction" means starting construction of foundation or frame of an approved structure, because the phrase itself includes the word "commencement." On the other hand, the text clearly does not mean "completion" of the foundation or frame, otherwise, the County simply would have said so in the above section. ORS 174.010. The necessary question then, is how far along either the foundation or frame must be to count as "actual construction."

Used in this sentence, the word "actual" is an adjective qualifying the word "construction." According to Webster's Third Int'l Dictionary (1981 Ed.), the adjective form of the word "actual" means "1. involving or relating to acts or deeds," "2. *existent*—contrasted with *potential* or *possible*," "3. not spurious," "4. in existence or taking place at the time." The word "construction" in this context is a use of the transitive form of the verb "construct," which means to "form, make, or create by combining parts or elements." Certainly, excavation of the foundation is an essential component of "forming" or "making" the foundation. With the understanding that MCC § 37.0690(C) does not require *completion* of the foundation or framing,

the logical meaning of the phrase "actual construction of the foundation" is that the permittee must have done at least some physical work on the site associated with foundation construction that is more that site grading.

The record is clear that, in addition to site grading, the Appellant hired a contractor to dig a hole for the actual foundation, to dimensions appropriate to the foundation plan. Photographs showing the foundation hole are enclosed as **Exhibit 11**. The contractor hired by Appellant was not hired to do general site grading; he was specifically hired to dig the foundation and surrounding building pad, as evidenced by **Exhibit 12**. This work was done prior to the September 11, 2019 Land Use Permit expiration date, as evidenced by Mr. Khut's May 9, 2019 email in which he explains that he had received notice of such construction.

Further, letters in the record from major construction contractors demonstrate that the commonly-understood meaning of foundation construction among those who actually do that work includes digging the foundation hole.

5. The Land Use Permit remains in effect because the Reeds "initiated" their "development action" prior to both September 11, 2017 and September 11, 2019.

Regardless whether the Hearings Officer agrees with the County's new position that the Land Use Permit was valid for only two years, the Hearings Officer can and should find that the Land Use Permit remains valid because the Reeds "initiated" their "development action" for purposes of OAR 660-033-0140. Expirations of development permits in exclusive farm use zones is governed by OAR 660-033-0140, which in 2015 provided as follows:

> (1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.

Exhibit 13. As the Hearings Officer is aware, the County's regulations must be consonant with OARs governing resource lands. There is no definition of "development action" in OAR 660, MCC Ch. 37 or the current version of the Zoning Code, MCC Ch. 39. In the MCC, uses of the term "initiated" in both Chapters 37 and 39 relate to the initiation of *proceedings* (e.g. enforcement (MCC 39.1525) and land use applications (MCC 39.1115).

Assuming that the County's decision to use "commence construction" instead of the OAR's terms "initiate" a "development action" was intended to reduce the universe of actions a landowner may take to initiate a development action, it did so in violation of OAR 660-033-0140, and it may not now apply its definition of "commence construction." In the absence of a contrary definition in the OARs, MCC, or any other applicable law, the Hearings Officer can find that the Reeds "initiated" their development action by submitting their building plans for the County's review and applying for a grading permit for their home prior to September 11, 2017.

On the same token, the Hearings Officer can find that those same actions, coupled with the County's approval of the Reeds' building plans and their grading permit, coupled with actual grading and foundation construction, clearly demonstrate that they had "initiated" their "development action" prior to September 11, 2019.

6. The County should be estopped from claiming that the Reeds' permit had expired because LUD staff indicated to the Reeds twice that it understood construction to have commenced.

The County clearly represented to the Reeds that it understood construction to have commenced on the Reeds' home. The Reeds certainly agreed and had every reason to rely on the County's understanding that they had started construction. As a consequence of this representation, the County must be estopped from now claiming that the Reeds have not "commenced construction."

The elements of equitable estoppel are laid out in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1973), as follows: "to constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; [and] (5) the other party must have been induced to act upon it.* * *'" *Id*. at 180-81 (quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908)).

In this instance, Mr. Khut's 2018 and 2019 emails stating that the Reeds had started construction on their home were, under the County's interpretation of the phrase "commencement of construction," incorrect. Mr. Khut clearly had knowledge of the facts surrounding the Reeds' construction activity, as his emails indicated that he had notice of such activities and indeed, he was the planner assigned to review and approve the Reeds' home plans and grading permit. As for whether the Reeds were "ignorant of the truth" (i.e. the "truth" that they had, under the County's interpretation, not actually "commenced construction"), there can be no doubt that, at all relevant times, the Reeds believed that they had indeed "commenced construction." Mr. Khut's May 9, 2019 statement clearly evinced an intent that the Reeds act upon it: it was his observation that Mr. Reed had "begun work on [his] single-family dwelling again," that he used as the basis for his warning that "you or your contractors are required to maintain 'Best Management Practices'." Stated simply, Mr. Khut was using the Reeds' construction activities as a basis upon which to order the Reeds to take certain actions; there can be no doubt that Mr. Khut intended the Reeds to act upon his representation—if the Reeds' home were not under construction, they would not have to observe "best management practices." Finally, there can be no doubt that the two emails from Mr. Khut implying and stating that the Reeds had started construction would induce any reasonable person (and certainly, an reasonable non-planner) to continue with their project without seeking an extension of their land use permit.

If the Hearings Officer finds that the Reeds did not "commence construction" prior to September 11, 2019, the Hearings Officer should nonetheless find that the County is estopped from now claiming that the Reeds have failed to do so because it induced them to believe that they already had.

7. The County should be estopped from now claiming, for the first time, that the Land Use Permit expired on September 11, 2017.

For the same reasons above, the Hearings Officer should find that the County cannot now change the position that it had maintained for nearly six years that the Reed's Land Use Permit expired on September 11, 2019. The Reeds were induced on numerous occasions to continue additional permitting activity after September 11, 2017 and its attendant costs, which are detailed in **Exhibit 14**. These include $150,056 for the design of the home and grading plans, $8,111.82 for permitting at the City of Portland, $169,901.76 for actual grading and excavation of the home site, and $30,223 for excavation of the foundation.

As explained above, Mr. Khut was substantially aware at all relevant times of the status of the Reeds' house design and construction and continued to induce them the proceed by (1) approving permits and plans relating to home construction after September 11, 2017 and (2) expressly observing in writing that the Reeds had started construction.

8. The Reeds have a vested right to complete their home.

Under Oregon's common law vested rights doctrine, a landowner that has met certain legal standards is entitled either to continue a preexisting use or to complete a partially finished one. *Clackamas County v. Holmes*, 265 Or 193, 197–198, 508 P2d 190 (1973). *Holmes* described a set of factors that serve as the framework for consideration of a claim of vested rights. These factors are "the ratio of expenditures incurred to the total cost of the project," in addition to: "[T]he good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects."

The Reeds have spent hundreds of thousands of dollars in pursuit of construction of their home, the construction costs of which was anticipated to be $2.4 million. These costs include the following (which excludes the cost of initial land-use permitting):

- Design (architecture and engineering): $150,056.15.
- Grading: $169,901.76.
- Foundation Construction: $30,223.
- City of Portland Land Use Permitting: $8,111.82.

An enclosed spreadsheet (**Exhibit 14**) details all payments associated with home construction. The total of the above expenditures is $358,292.73, which constitutes 14 percent of the

anticipated construction costs. All of these expenditures were directly related to completion of the Reeds' home.

At all times, the Reeds proceeded in good faith by securing their land use permit, submitting their building plans, and submitting for a building permit with the City of Portland soon after the County approval of their building plans. They received no notice from the County or the LUD that their permit expired until it was too late to request an extension. Mr. Khut's August 1, 2018 and May 9, 2019 emails dispelled any reasonable doubt that the Reeds might have had that they had "commenced construction" as far as the LUD was concerned.

When considering "the kind of project, the location and ultimate cost," one must recognize that this is a family home and farm house; there is nothing unusual about it in the chosen location, which is dotted with farm houses and non-farm dwellings. Once their land use permit was approved and the Reeds began work on the foundation, they simply had no reason to believe that they would be prevented from completing their home.

Finally, there can be no doubt that this work went beyond mere preparation. The Reeds secured their land use permit, applied for their building permit, obtained a grading and erosion control permit, graded the home site and dug the foundation.

The Reeds' case plainly meets the *Holmes* factors. The County responds by citing *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998) for the proposition that the vested rights doctrine is unavailable to those who proceed under a conditional use permit. While it is true that LUBA held that vested rights relief was unavailable in that case, there are a number of reasons why the Reeds raise the vested rights doctrine here. First, the facts in *Heidgerken* are simply quite different – there, the applicant was not induced as the Reeds were here to believe that it had started construction. Second, the County's changed interpretations—first that the Reeds had started construction and now that they have not "commenced construction," and first that the Reeds had until September 11, 2019 and now that they had only until September 11, 2017 to "commence construction—are reasonably viewed as changes in application and interpretation of applicable law that occurred after the Reeds began construction of their home. Finally, LUBA is seldom the last word on common law principles and LUBA's holding in *Heidgerken* was never tested by an appellate court.

9. MCC 37.0695 is not "clear and objective" and therefore cannot be applied to the Reed's farm dwelling approval.

Finally, as the application is for the "development of housing," it can be subject only to "clear and objective conditions and procedures."[2] Given the County's flip-flop both as to

[2] Note that while the original form of ORS 197.307(4) was restricted to "needed housing" (i.e. housing within an urban growth boundary), 2017 amendments found that ORS 197.307(4) applied to all "development of housing," with only two exceptions, none of which are relevant here. *Warren v. Washington County*, 78 Or LUBA 375 *aff'd*, 296 Or App 595, 439 P3d 581 (2019).

whether construction had commenced and whether the deadline for commencement of construction was in 2019 or 2017, the Hearings Officer should conclude that MCC 37.0695 is not clear and objective and cannot be applied to the Reeds' farm dwelling approval.

10. Conclusion

For the above reasons, the Hearings Officer should reverse the County's decision and find that the Reeds farm dwelling approval (T2-2014-3377) remains valid.

Best regards,

Garrett H. Stephenson

GST:jmhi
Enclosures

cc: Mr. Scott L. Reed *(via email) (w/enclosures)*

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February 27, 2014 4:18 PM

Edit

10:02

Portland - Forest Park
January 31, 2014 2:07 PM

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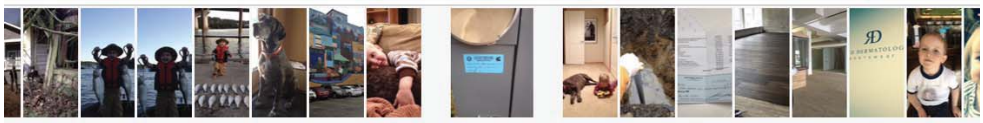

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Portland - Forest Park
May 29, 2017 5:04 PM

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Exhibit 3

8:46

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June 10, 2017 8:27 PM

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HDR

Exhibit 4 Pg. 1

8:43

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April 2, 2017 4:48 PM

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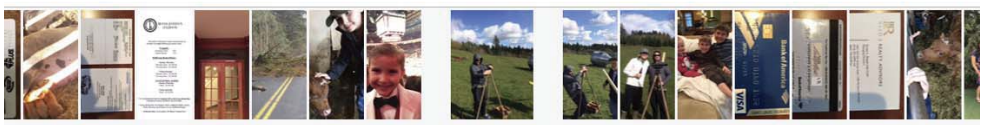

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October 2, 2018 10:15 AM

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LIVE HDR

Exhibit 5

BDZE CONSTRUCTION

September 6, 2021

Garrett Stephenson
Schwabe Williamson & Wyatt
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204

RE: Foundation Construction

Mr. Stephenson:

I am the owner of BDZE Developers based out of Beaverton. We are one of the largest residential construction contractors in the Portland metro. Our primary focus is the construction of utilities, site work, and foundations. In the last five years, BDZE has worked on the foundations over 1,000 homes, apartments, and townhouses in the Portland metro.

I was asked by Scott Reed to give my opinion as to what the construction industry believes the physical construction steps are in building a foundation. The steps below outline the approach to a typical reinforced concrete residential foundation.

Step 1 – Physically layout the foundation, footings and/or basement on the site with stakes and/or markings.

Step 2 - Excavate the foundation, footings and/or basement to required depths.

Step 3 - Layer bottom of excavation with rock, sand, and/or plastic poly as specified.

Step 4 - Set forms to retain concrete as specified.

Step 5 - Place and tie rebar and/or other reinforcement.

Step 6 - Call for inspection of excavation, underlayment, reinforcement, and forms.

Step 7 - Pour and finish concrete to plan specifications.

Step 8 - Strip forms from foundation.

Step 9 - Call final inspection of foundation.

In my professional opinion, the construction has started on a foundation once it has been laid out and excavated.

Call with any questions,

Tony Edwards
Owner, BDZE Developers
(503) 372-9773