

FILED: March 28, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN JOHNSON,
Petitioner-Respondent,

v.

DESCHUTES COUNTY,
a political subdivision of the State of Oregon,
acting by and through its Board of County Commissioners,
Respondent-Appellant.

Deschutes County Circuit Court
09CV0114AB

A144929

A. Michael Adler, Judge.

Argued and submitted on February 08, 2011.

Steven Griffin argued the cause and filed the briefs for appellant.

Lisa D.T. Klemp argued the cause for respondent. With her on the brief were Edward P. Fitch and Bryant, Emerson & Fitch, LLP.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

HASELTON, P. J.

Vacated and remanded with instructions to enter judgment vacating the county's decision and remanding for reconsideration in light of [*Friends of Yamhill County v. Board of Commissioners*](#), 351 Or 219, 264 P3d 1265 (2011).

1 HASELTON, P. J.

2 Respondent Deschutes County appeals the judgment in a writ of review
3 proceeding that vacated and remanded the hearings officer's determination that petitioner
4 John Johnson has a vested right to complete development of one phase of his residential
5 subdivision in compliance with waivers issued pursuant to Ballot Measure 37 (2004) but
6 does not have a vested right to complete the remaining three phases of the subdivision.
7 On appeal, the county contends, *inter alia*, that the writ of review court erred in
8 determining that the hearings officer "misconstrued the law respecting 'common law
9 vested rights.'" In light of the Supreme Court's decision in [Friends of Yamhill County v.](#)
10 [Board of Commissioners](#), 351 Or 219, 264 P3d 1265 (2011) (*Friends II*)--which was
11 decided during the pendency of this appeal and clarified the vested rights analysis that
12 applies in cases such as this--we reject the county's contention that the writ of review
13 court erred in determining that the hearings officer misconstrued the applicable law.
14 However, for the reasons explained below, we also conclude that the court erred in
15 remanding for the hearings officer to reconsider the decision consistently with the writ of
16 review court's findings of fact and conclusions of law. Accordingly, we vacate and
17 remand the writ of review court's judgment with instructions to vacate and remand the
18 county's decision for reconsideration in light of *Friends II*.

19 The material facts are uncontroverted. Measure 37 waivers from the state
20 and the county allowed Johnson to develop his 52.6 acres into a 40-lot residential
21 subdivision in four phases. Development costs--including the cost of building a

1 residence in the first phase of the subdivision--were incurred.¹ Johnson obtained
2 tentative subdivision approval in September 2006 and received the final plat approval for
3 the first phase of the subdivision--which consisted of seven residential lots--before Ballot
4 Measure 49 (2007) became effective in December 2007.²

5 Thereafter, Johnson applied for a determination from the county that he had
6 a common law vested right to complete and continue the development described in the
7 waivers.³ Johnson contended that his "substantial investment [met] the threshold for
8 common law vesting under Oregon law."

9 The hearings officer explained that, "[i]n *Clackamas Co. v. Holmes*, 265 Or
10 193, 508 P2d 190 (1973) * * *, the Oregon Supreme Court [had] identified factors to be
11 considered in the analysis required to determine whether there is a common law 'vested

¹ For a detailed description of the evolving legal context in which this case arose, see *Friends II*, 351 Or at 222-25.

² Johnson had also applied for final plat approval for the second phase of the subdivision before Measure 49 became effective. Our understanding is that Johnson's application concerning the second phase was pending and Johnson had not submitted applications for final plat approval of the remaining two phases.

³ As pertinent here, section 5(3) of Measure 49 provides that claimants who had filed Measure 37 claims before June 28, 2007, had an entitlement to just compensation as provided in

"[a] waiver issued before the effective date of this 2007 Act [December 6, 2007] to the extent that the claimant's use of the property complies with the waiver and *the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.*"

(Emphasis added.)

1 right[.]” Specifically, in *Holmes*, the Supreme Court stated:

2 “The test of whether a landowner has developed his land to the
3 extent that he has acquired a vested right to continue the development
4 should not be based solely on the ratio of expenditures incurred to the total
5 cost of the project. We believe the ratio test should be only one of the
6 factors to be considered. Other factors which should be taken into
7 consideration are the good faith of the landowner, whether or not he had
8 notice of any proposed zoning or amendatory zoning before starting his
9 improvements, the type of expenditures, i.e., whether the expenditures have
10 any relation to the completed project or could apply to various other uses of
11 the land, the kind of project, the location and ultimate cost. Also, the acts
12 of the landowner should rise beyond mere contemplated use or preparation,
13 such as leveling of land, boring test holes, or preliminary negotiations with
14 contractors or architects.”

15 *Id.* at 198-99.

16 The hearings officer explained that “[t]he expense/total project cost ratio
17 analysis in *Holmes* is not the only factor to be considered in determining whether
18 [Johnson] has established a vested right to continue development of the 40-lot
19 subdivision with a dwelling on each lot.” However, the hearings officer’s analysis was
20 essentially predicated on consideration of the expenditure ratio, which the hearings
21 officer indicated “is by far the most significant factor.”

22 In calculating the expenditure ratio, the hearings officer made three
23 significant observations. First, the hearings officer explained that, when calculating the
24 numerator of the expenditure ratio, “[e]xpenditures that commit the property to the
25 particular use contemplated by the developer may be included in the ratio analysis” but
26 that “expenditures that can be applied to other allowed uses may not be considered
27 directed toward the purported vested right.” Second, the hearings officer noted that

1 expenditures made before the December 6, 2007, effective date of Measure 49 were made
2 in good faith. Third, in terms of the denominator, the hearings officer explained that the
3 projected cost of residential construction must be included in the total project cost.

4 In applying the ratio to the circumstances of this case, the hearings officer
5 determined that,

6 "although [Johnson] has made significant expenditures toward the cost of
7 completing Phase I of the subdivision sufficient to establish a vested right
8 to complete that phase, * * * [Johnson's] qualified expenditures are not
9 sufficient to establish a vested right to complete Phases II, III and IV of the
10 subdivision or to develop dwellings on the lots in those three phases."

11 Johnson sought review of the hearings officer's decision in circuit court.⁴

12 On review, the court vacated the hearings officer's decision. The writ of
13 review court determined that the hearings officer had erred in calculating the expenditure
14 ratio. That determination was based on *the writ of review court's own* detailed findings of
15 fact--many of which were contrary to those found by the hearings officer. Further, the
16 court concluded that the hearings officer had misconstrued the law in reaching her
17 determination. Specifically, the court explained that "[t]he hearings officer * * * erred in
18 strictly relying on a ratio assessment rather than utilizing all of the factors required under
19 a common law vesting analysis * * *." Ultimately, the court entered a general judgment
20 vacating the hearings officer's decision and remanding the decision "for reconsideration
21 consistent with the Findings of Fact and Conclusions of Law entered by *the court*."

⁴ Pursuant to an order of the Deschutes County Board of Commissioners, "[f]or all applications for a common law vested rights decision pursuant to Ballot Measure 49, * * * the hearings officers' decisions shall be the final decision[s] of Deschutes County."

1 (Emphasis added.)

2 The county appeals. On appeal, the county contends, *inter alia*, that the
3 writ of review court erred when it determined that the hearings officer "misconstrued the
4 law respecting 'common law vested rights.'"

5 While the parties were in the process of completing their appellate briefs,
6 we decided [*Friends of Yamhill County v. Board of Commissioners*](#), 237 Or App 149, 238
7 P3d 1016 (2010) (*Friends I*), [*aff'd*](#), 351 Or 219, 264 P3d 1265 (2011)--a case in which we
8 examined the meaning of the term "common law vested right" as used in section 5(3) of
9 Measure 49 and the application of the *Holmes* factors in that context. Specifically, in
10 *Friends I*, we reasoned that,

11 "[i]n determining whether a claimant meets the separate requirement
12 in section 5(3) of a 'common law vested right,' the *Holmes* factors for
13 determining the existence of a vested right that are otherwise applied
14 through those other parts of section 5(3) (*i.e.*, good faith, expenditures on
15 the waived use, particular timing of expenditures) are less probative as
16 markers of a 'common law vested right' than the factors that remain (*i.e.*,
17 expenditure ratio, cost and location of project) in order to avoid an internal
18 redundancy in the section. Therefore, what becomes *more* material to a
19 section 5(3) determination are the other *Holmes* factors--the expenditure
20 ratio, remaining issues about the adaptability of the investment to otherwise
21 lawful uses under Measure 49, and the kind of project, including its
22 location and costs. The text of section 5(3), then, prompts a more focused
23 inquiry on whether a common-law vested right exists under that section
24 than would be the normal case where none of the *Holmes* factors are
25 predominant. Instead, the text and context of section 5(3) of Measure 49
26 makes a determination of the nature of the ultimate project (the location,
27 extent, and type of residential development and its costs) and an assessment
28 of the expenditure ratio particularly material to a vested rights decision
29 under the measure."

30 237 Or App at 177 (citation omitted; emphasis in original).

1 Relying on that passage from *Friends I*, the county explained that, "when
2 evaluating whether a claimant is entitled to 'vested rights' relief under Ballot Measure 49,
3 section 5(3)[,] this court has instructed that two *Holmes* factors are to be given primacy,
4 the nature of the project and the expenditure ratio." Because the hearings officer's
5 analysis comported with that analytical construct, the county asserted that the writ of
6 review court erred in determining that the hearings officer misconstrued the applicable
7 law in applying the *Holmes* factors to this case.

8 After oral argument of this appeal, the Supreme Court issued its decision in
9 *Friends II*. Although the Supreme Court affirmed our earlier decision in that case, it
10 clarified the proper analysis for determining whether, pursuant to section 5(3) of Measure
11 49, a landowner has a vested right to complete and continue development in compliance
12 with a Measure 37 waiver. Specifically, the Supreme Court reasoned:

13 "We * * * conclude that the Court of Appeals erred [in *Friends I*] in
14 holding that compliance with the terms of section 5(3) means that a
15 landowner's expenditures necessarily will relate to the proposed use and be
16 made in good faith. We also conclude that the Court of Appeals erred in
17 discounting some of the *Holmes* factors and finding, as a result, that other
18 factors were 'more material.' Having reached those conclusions, we note
19 that all the *Holmes* factors may not apply in a given case and that the extent
20 to which they do apply will presumably vary with the circumstances of
21 each case. We also note that, when a landowner seeks to establish a vested
22 right because 'substantial costs toward completion of the job * * * have
23 been incurred,' only one of the *Holmes* factors entails consideration of the
24 'costs * * * incurred'--namely, 'the ratio of expenses incurred to the total
25 cost of the project.' See *Holmes*, 265 Or at 197 (listing that factor). That
26 factor provides an objective measure of how far the landowner has
27 proceeded towards completion of the construction. As such, we think it
28 provides the necessary starting point in analyzing whether a landowner has
29 incurred substantial costs toward completion of the job, although the other

1 *Holmes* factors will bear on whether the costs incurred are substantial
2 enough to establish a vested right under section 5(3)."

3 *Friends II*, 351 Or at 242-43.

4 With regard to the expenditure ratio, the Supreme Court specifically
5 explained that, in *Holmes*, it had determined that expenditures may be included in the
6 numerator even if they are not made exclusively for the proposed development.⁵ *Friends*
7 *II*, 351 Or at 237. Further, the Supreme Court noted that the adaptability factor is not
8 subsumed within a calculation of the numerator--that is, expenditures that could be
9 adaptable to another allowed use are not necessarily excluded from the numerator. *Id.*
10 Instead, the Supreme Court in *Friends II* noted that, as explained in *Holmes*, "whether the
11 expenditures have any relation to the completed project or could apply to various other
12 uses of the land [is] one of five factors that should be taken into consideration *in addition*
13 to the expenditure ratio." 351 Or at 237 (internal quotation marks omitted; emphasis in
14 original).

15 In sum, the court emphasized that

⁵ In *Friends II*, the Supreme Court contrasted its decision in *Holmes* with a New York decision applying the ratio factor that it had examined in *Holmes*--viz., *Town of Hempstead v. Lynne*, 32 Misc 2d 312, 222 NYS2d 526 (1961). Specifically, in *Friends II*, the Supreme Court noted that,

"in determining the expenses incurred, *Town of Hempstead* had considered only those expenditures made 'for the exclusive purpose' of the proposed development. *Holmes*, 265 Or at 198 (describing *Town of Hempstead*). *Holmes* instead identified the issue as whether 'the expenditures have any relation to the completed project or could apply to various other uses of the land.' *Id.* at 198-99."

351 Or at 237.

1 "the ratio provides only the starting point for the analysis. It is not the sole
2 factor to be considered, nor will it necessarily be the dispositive factor; that
3 is, there is not some specific percentage which must always be present
4 before the right to complete construction will vest. For example, *Holmes*
5 states that the 'ultimate cost' also matters in the analysis. 265 Or at 199. As
6 we understand *Holmes*, it lists the 'ultimate cost' of the project separately
7 from the expenditure ratio (which incorporates the cost of the project)
8 because the weight to be given the expenditure may vary depending on the
9 ultimate cost. More specifically, if the ultimate cost of developing a project
10 is \$1,000, a landowner who spends \$200 toward its development will have
11 incurred 20 percent of the projected cost. Few people, however, would
12 think \$200 a substantial expenditure, at least when determining whether a
13 landowner's expenditure is substantial enough to complete and continue a
14 prohibited use. Conversely, when the ultimate cost of a project runs into
15 millions of dollars, an expenditure may be substantial even though it is only
16 a small percentage of the projected cost."

17 *Friends II*, 351 Or at 247-48 (footnote omitted). In sum, the court reiterated that
18 "focus[ing] solely on the expenditure ratio" is improper. *Id.* at 237.

19 Here, the legal underpinnings of the hearings officer's decision generally--
20 and her essentially singular focus on the expenditure ratio specifically--were consistent
21 with the analytical construct applied in *Friends I*. However, as noted, the Supreme Court
22 illuminated and refined that construct in *Friends II* by explaining the nature of the various
23 *Holmes* factors and admonishing that the expenditure ratio, while certainly significant, is
24 not singular. Given the instruction of *Friends II*, the hearings officer misconstrued the
25 applicable law in evaluating Johnson's application for a vested rights determination
26 pursuant to Measure 49. Accordingly, the writ of review court did not err to the limited
27 extent that it determined that the hearings officer had misapprehended the applicable
28 legal standard of "common law vesting" and in remanding for reconsideration on *that*
29 basis.

1 That would ordinarily conclude our appellate review--that is, having
2 concluded that the writ of review court did not err in its disposition, we would simply
3 affirm. However, the circumstances of this case are not ordinary.

4 Here, as we have previously explained, ___ Or App at ___ (slip op at 4-5),
5 the writ of review court rendered its own extensive factual findings. That is something
6 that a writ of review court cannot do. As the Supreme Court explained in *Alt v. City of*
7 *Salem*, 306 Or 80, 85, 756 P2d 637 (1988), on writ of review, "[t]he reviewing court does
8 not decide what the facts are, but merely decides the legal question whether the evidence
9 is sufficient to support the decision." Relatedly, when the writ of review court issued its
10 judgment, it circumscribed the scope of the hearings officer's reconsideration on remand
11 by requiring that "reconsideration [be] consistent with the Findings of Fact and
12 Conclusions of Law entered by *the court*." (Emphasis added.) Accordingly, we must
13 vacate the writ of review court's judgment and remand with instructions to enter a
14 judgment vacating the county's decision and remanding for reconsideration in light of
15 *Friends II*.⁶

16 Vacated and remanded with instructions to enter judgment vacating the
17 county's decision and remanding for reconsideration in light of [*Friends of Yamhill*](#)
18 [*County v. Board of Commissioners*](#), 351 Or 219, 264 P3d 1265 (2011).

⁶ Our analysis and disposition obviate the need to consider the county's other contentions on appeal concerning whether the hearings officer's findings were supported by substantial evidence.