

Kini Cosma  
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Klamath Falls, OR 97603  
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In Propria Persona

IN AND FOR THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF KLAMATH

Kini Cosma,	)	Case No. 0803782CV
	)	Associate Cases: 0803718CV
Plaintiff,	)	
	)	
Vs.	)	
	)	MOTION FOR
MONA RICHARDSON, GARY RICHARDSON,	)	SUMMARY JUDGMENT
CARROLL L. SPANGLER, PATRICIA SPANGLER,	)	AGAINST DEFENDANTS
DOES 1-100 INCLUSIVE	)	RULE 47 A
	)	
_____ Defendant(s) _____	)	

TO: CARROLL L. SPANGLER, PATRICIA SPANGLER,  
MONA RICHARDSON, AND GARY RICHARDSON, and attorneys on record.

PLEASE TAKE NOTICE that on \_\_\_\_\_ or as soon thereafter as counsel may be heard, in the courtroom of \_\_\_\_\_ of the above-entitled court, plaintiff will move for summary judgment against defendants pursuant to ORCP 47 of the complaint filed on or about Sept. 1, 2008 in Plaintiff's favor upon all or any part thereof.

This motion will be based on this Notice of Motion, on the attached declaration and Memorandum of Points and Authorities served and filed herewith, on all papers and records on file in this action, on points and authorities as may hereafter be filed with the court, on all the papers and records on file in this action, associated files, with or without supporting affidavits or declarations, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: \_\_\_\_\_ .Kini Cosma

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Kini Cosma,	)	Case No. 0803782CV
	)	Associate Cases: 0803718CV
Plaintiff,	)	
	)	
Vs.	)	
	)	MEMORANDUM AND POINTS
MONA RICHARDSON,	)	AND AUTHORITIES IN SUPPORT
GARY RICHARDSON,	)	OF MOTION FOR
CARROLL L. SPANGLER,	)	SUMMARY JUDGMENT AGAINST
PATRICIA SPANGLER,	)	DEFENDANTS
DOES 1-100 INCLUSIVE	)	RULE 47
	)	
_____ Defendant(s)	)	

PLEASE TAKE NOTE that Plaintiff, Kini Cosma, hereby moves, with or without supporting affidavits or declarations, for a summary judgment in Plaintiff's favor upon all or any part thereof.

**JURISDICTION**

This court of this state has jurisdiction of the subject matter pursuant to Rule 4 in any action, whether arising within or without this state, against a defendant when the action was commenced; including, but not limited to, any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant; and, in any action which arises out of the use, or possession of real

property situated in this state.

## FACTS

The material facts are not in dispute:

(1) The subject property, tax lot number: R-3909-011AC-03300-000, street address: 5332 Harlan Drive, #B, Klamath Falls, Oregon, 97603 is a lot of .50 acre in size and has been established as a land use per Klamath County Article 51.5 in a suburban residential (RS) zone.

(2) The lot described above contained at least one established single-family dwelling prior to November 15, 1990 and was created under the local and State laws in effect before April 23, 1979.

(3) Sometime in **1990-1995** the title of the subject property was acquired by Robert James who at the time constructed **a second residential dwelling structure for the use of multi-families in a single family residential zone**, hereinafter described as the “accessory/structure/residential dwelling.”

(4) Sometime during October 2000 until April 2005 the title of the subject property with the accessory/structure/residential dwelling was acquired by Dorris Campbell who then sold it to the present owners, Defendants Carroll and Patricia Spangler (hereinafter referred to as “**Spangler(s)**”). It is currently established at the assessor’s office as a second family dwelling and appears to be a dominate rather than subordinate structure.

(5) At all relevant times, the subject property has operated without applying for and obtaining a site plan or building and planning permits from the Klamath County Community Development Department. The said property has been within an area that requires building and planning permits to be obtained from the County prior to any

development. No such permits has ever been obtained.

(6) The net result of the construction of the existing accessory/structure/residential dwelling on the property, it's location, dimensions (including height), and decks, balconies, distance from property lines, drain lines, other structural elements and type of existing driveways and parking areas, and the use for occupancy have been deficient.

(7) The consequences are that, the land use of the above-said subject accessory/structure/residential dwelling is:

(a) inconsistent with the express language of the comprehensive plan or land use regulation;

(b) inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; and,

(d) contrary to state statutes, land use goal or rule that the comprehensive plan provision or land use regulation implements.

## I.

### **DEFENDANT(S) LOST ANY VESTED RIGHTS TO USE THE ACCESSORY/STRUCTURE/RESIDENTIAL DWELLING AS A COMMERCIAL/INDUSTRIAL AND RESIDENTIAL RENTAL**

Plaintiff incorporates paragraphs, and subparagraphs, 1 through 7 herein.

(8) The subject property has an existing structure that has not complied with outright, conditional or non-conforming use requirements that have resulted in, *inter alia*:

(a) illegalities in building and planning permits;

(b) the fact that any permits had expired;

- (c) assertions that building permits under the Uniform Building Code are nontransferable; and
- (d) assertions that the 1990-1995 construction was unlawful because the landowner failed to demonstrate compliance with the county's zone siting standards.
- (9) Plaintiff contends that Defendant Spangler(s) lost any vested rights pertaining to the use of the accessory/structure/residential dwelling as a commercial/industrial and residential rental provided to the current occupants because the 1990-1995 previous owner, Robert James, failed to timely resume efforts to complete and use the accessory/structure/residential dwelling according to Klamath County and state rules, regulations, and laws.
- (10) In addition, the Spangler(s), permitted the lot to sustain the detached accessory/structure/residential dwelling to operate as a multi-family residence while being zoned in a single-family suburban residential.
- (11) All variances, conditional use permits or other permits heretofore granted pursuant to the provisions of duly enacted Ordinances, or as such were not in effect and were not subjected to all the conditions and provisions governing such variances, conditional use permits or other permits pursuant to applicable provisions contained herein. Therefore any nonconforming use had expired, consequently, all applications and permits were revoked and further use was barred under local and state rules and regulations.
- (12) To determine compliance with zone code criteria for any new development, an application and **site plan is required**. Klamath County Code have been consistent 1972

through 1990. Under article 41.020, a review of a site plan is required for:

- A. Issuance of a building permit for new construction exclusive of interior remodeling;
- B. Septic systems land use compatibility;
- D. The construction, relocation, addition, extension, occupancy or use change of structure;
- E. Any development, or change of land use;
- F. Time extension requests.

(13) Any use established or conducted, or any building or structure existing in violation of any duly enacted ordinance upon the effective date of this code, shall not be deemed to have acquired status of rights of a nonconforming classification or any provisions thereof. To the extent that such use, building or structure was in violation of such ordinance, statute or law, or in **violation of this code, such shall be deemed a continuing violation.** (Article 12 Klamath County Code)

(14) Any use, activity building or structure found to be noncompliant, incompatible, or inconsistent with the Klamath County Comprehensive Plan or this code shall be considered a nuisance.

(15) Since County zoning ordinances have not permitted such a use, given the rural/residential zoning of the land in question, the previous landowner would have been prohibited from establishing an existing lawful use.

(16) Because the present owners/defendant(s), Spangler(s), acquired the property after the illegally constructed accessory/structure/residential dwelling, there is an assumption including an additional element, viz., that the new owners acquired a vested right from

the prior owner. (See Skrepetos v. Douglas County, 33 Or LUBA 502 (1997) A parcel that was illegally created in 1974 and then legalized by an “after-the-fact” decision in 1989 is not “lawfully created” under ORS 215.705(1), which requires that the parcel be “lawfully created” [p]rior to January 1, 1985.

### **Discussion**

(17) The issue before us is whether Defendant Spangler(s) had vested rights of the accessory/structure/residential dwelling built from 1990-1995 and whether any of those vested rights were transferred to the Spangler(s) in their ownership of said property.

(18) Vested rights are those uses that have not been established, but where substantial good-faith commitments or investments toward a particular use result in a lawful nonconforming use. Accordingly, we consider only events after 1990 in our discussion of abandonment and interruption. See Terraces Condo Assoc. v. City of Portland, 22 Or LUBA 151 (1991) where the issue on appeal was whether petitioner had a vested right to develop property in a manner **inconsistent with current zoning regulations**, and the resolution of that issue required the application of city land use regulations from 1973 to the present.

(19) Plaintiff points to her instance case that no applications were ever submitted to the Klamath County building or planning departments. ORS 215.427(3), which requires that, in certain circumstances, approval or denial of a land use application "shall be based upon the standards and criteria that were **applicable at the time the application** was first submitted.

(20) Plaintiff emphasizes there are reasons for permits, approval standards, and statutory requirements calculated to ensure mitigation of adverse impacts and to prevent

faulty construction. *See standard law discussions for:*

- A local code provision that imposes "**compatibility**" as a permit approval criterion adequately informs interested parties of the basis on which an **application will be approved or denied** and, therefore, complies with ORS 215.416(8), *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993);
- To establish a challenge under ORS 227.173(1) or ORS 215.416(8), a petitioner must **demonstrate that a standard is so vague** that an applicant is unable to determine whether and how approval may be granted, *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000);
- A local code conditional use permit standard requiring that "**the characteristics of the proposed use will have minimal adverse impact on the livability, value, or appropriate development of abutting properties and the surrounding area**" is not impermissibly vague, *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994);
- ORS 215.416(8)(a) simply requires that permit approval standards be included in a county's land use regulations. The ORS 215.416(8)(b) requirement that permit standards that apply to needed housing be "clear and objective" does not apply to permits for other kinds of development, *Clark v. Coos County*, 53 Or LUBA 325 (2007).
- *Snow v. Amherst County Board of Zoning Appeals*, 448 SE2d 606, 608-09 (Va. 1994) (to establish a vested right, a landowner must demonstrate that he **diligently** pursued a use authorized by local government permit or approval, and incurred substantial expense in good faith prior to the change in zoning).
- A zoning code requirement that certain comprehensive plan policies be complied with

unless the applicant demonstrates there is "good cause" not to, is not impermissibly vague, *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994);

- An application for an extension of a conditional use permit involves the "discretionary approval of a proposed development of land" and is subject to the requirement at ORS 215.416 that approval or denial of a permit be subject to standards and criteria, **where the local code contains no standards governing permit extensions** and thus grants unfettered discretion to the county to approve or deny the extension, *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998);

(21) A copy of the applicable portion of the **1990 Uniform Building Code (UBC)** is in the county's record. *See ORS 455.040 and OAR 918-460-0010*. The UBC provides that **a building permit becomes "null and void" if the work authorized is not commenced within six months from the permit issue date, "or if the building or work authorized by such permit is suspended or abandoned at any time after the work is commenced for a period of six months."** UBC § R-109.3

(22) The Code also says that before work can be resumed, "a new permit shall be obtained to do so \* \* \*." *Id.* (emphasis added). A "one-time" extension is possible **provided that the permittee holding an unexpired permit can show good and satisfactory reasons ("beyond his control") why the work cannot be commenced within the six-month initial period.**

#### **Actual Use**

(23) *Conversely*, vested rights are an exception to the "actual use" requirement to establish a nonconforming use, in situations where a property owner has incurred substantial and legally sufficient expense. *See Clackamas County v. Holmes*, 11 Or App

1, 501 P2d 333, *rev'd on other grounds* 265 Or 193, 508 P2d 190 (1972)

(24) Plaintiff contends, the existing and use of the accessory/structure/residential dwelling upon which substantial work has been completed are not an exception to the actual use requirement to establish a nonconforming use because a nonconforming structure or use that is abandoned or discontinued for any reason for more than two years **shall not be re-established unless it complies with code requirements applicable at the time of the proposed resumption.** Although the county can refine or amplify the statutory requirements of ORS 215.130, the county's nonconforming use regulations must be consistent with that statute. *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 936 P2d 990 (1997)

(25) While it is arguable that a similar principle would govern a determination of whether a vested right has lapsed: *i.e.*, the economic reasonableness of the actions or inactions constituting abandonment or interruption would still play a role in that determination.

(26) Even if there are applied principles of "the grandfather clause," or a similar limiting principle, Plaintiff contends those rights were extinguished because the pertinent statutes and ordinances. ORS 215.130 provides, in part:

"(5) The **lawful use** of any building, structure or land **at the time of the enactment** or amendment **of any zoning ordinance or regulation** may be continued. \*\*\*A change of ownership or occupancy shall be permitted.

"(7) (a) Any use described in subsection (5) of this section **may not be resumed** after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

(27) In sum, a person does not have a right, pursuant to subsection (5) of ORS 215.130 to continue a nonconforming use of land if that use is unlawful in substance.

(27) Except as provided in ORS 215.215, a county shall not place conditions upon the continuation of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. Only then can a change of ownership or occupancy be permitted.

*See also League to Save Lake Tahoe v. Crystal Enterprises*, 490 F Supp 995, 998 (D Nev 1980), *aff'd* 685 F2d 1142 (9<sup>th</sup> Cir 1982) (construing zoning ordinance term “use” to include partially constructed buildings, for purposes of determining whether failure to continue construction for more than one year after the ordinance was amended rendered a grandfather clause inapplicable).

## II.

### **DEFENDANT FAILED TO ESTABLISH VESTED RIGHTS BECAUSE THE USE DID NOT CONFORM WITH THE REQUIREMENTS OF ZONING ORDINANCES OR REGULATIONS APPLICABLE AT THE TIME OF THE PROPOSED RESUMPTION**

Plaintiff incorporates paragraphs 1-27 herein.

(28) Defendant failed to establish a vested right when, the building approvals expired before any completion of the construction of the accessory/structure/residential dwelling from 1990-1995.

(29) Sometime in September 1995, a construction permit was granted to Robert James and in **October 1995, a gas line pressure inspection was conducted.** No further construction or expenditures toward construction took place. Whether the prior expenditures have any relationship to the completed project or could apply to various

other uses of the land, and the nature of the project, its location and ultimate cost does not appear to be on record.

(30) Most recently, a building permit was granted on **July 10, 2007 for a sewer line.**

This permit was granted to the Spangler(s). It is unapparent whether a this was for the primary residence or the accessory/structure/residential dwelling.

(31) According to Klamath County Code, a zone for suburban residential purposes under Article 51.5 is subjected to a review of a site plan, and all other applicable standards, criteria, rules and statutes governing such uses pursuant to Article 41.020:

Issuance of a building permit for new construction exclusive of interior remodeling; Septic systems land use compatibility; the construction, relocation, addition, extension, occupancy or use change of structure; any development, or change of land use;

(32) **Regardless**, the construction of accessory/structure/residential dwelling and septic system drain lines have been allowed to breach property lines. They are protruding from the building wall and at one point had leaked sewage onto the property line.

(33) **Regardless**, the construction of the accessory/structure/residential dwelling has been used to accommodate multi-families in a single-family residential zone without such review.

(34) Accordingly, **setback requirements specified in Section 62.040 shall be observed.**

(35) **Regardless**, Defendant's decks, terraces, steps, or other similar architectural features which have been placed upon the ground or finished grade exceeds 30 inches in height above the ground or finished grade exceeding the proportionate setbacks to the

property lot line for RS zone structured heights of 35 feet and side setbacks of 10 feet for which Plaintiff was subjected to constant, unwavering, emotional abuse through the use of spewed sexual orientation epithets, profanities, and harassment by Defendants Richardson(s) and their guests.

(36) According to Klamath County Code Article 62.050, the minimum setback shall be 25 feet plus 1 foot for each 3 feet of building height greater than 12 feet; or where a commercial or industrial zoned property abuts an alley or right-of-way, the rear setback shall be a minimum of 10 feet. (The setback for accessory structures and buildings greater than 14 feet in height.)

(37) **Regardless**, Defendants Richardson(s) have been permitted to operated a commercial and/or industrial automotive enterprise where side setbacks abuts this residential zone at a distance less than 4 feet where Plaintiff was subjected to constant revving engines with high octane emissions.

(38) The purpose of establishing and maintaining standards for fences, walls and screening are to protect certain uses from intrusion to protect the public from uses which may be hazardous, and to increase compatibility of different land uses.

(39) The quality and condition of being secluded from the presence or view of others and the state of being free from unsanctioned intrusion is living either next door to bad neighbors or within very close proximity to them.

(40) **Regardless**, Defendant(s) Spangler(s) have not added any expenditures to accommodate Section 64.060 for required screening for a sight obscuring fence or wall at least 8 feet in height to be required within the side or property lines for a nonconforming commercial or industrial land use. This has impeded Plaintiff's privacy detrimentally.

(41) **Regardless**, Defendant(s) acted to vacate lot lines through adverse possession, hostility, fighting, yelling profanities and other expletives while accumulating garbage on their balcony, throwing trash off their balcony and out of their kitchen windows into Plaintiff's yard, and demanding Plaintiff to clean it up while in the immediate vicinity of Plaintiff from Defendant's decks, terraces, and steps.

(42) The purposes of landscaping under Article 65 requirements are to maintain and enhance the appearance of structures and properties, to provide for visual privacy and a quality visual environment, and to provide areas on sites to absorb rainfall and reduce storm water runoff.

(43) **Regardless**, sewage and drain lines have been permitted to flow into the immediate vicinity of Plaintiff's adjacent property. This includes the outdoor mechanical equipment appurtenant to commercial or industrial uses not being screened from view from Plaintiff's adjacent property as required.

(44) The purpose of off-street parking and loading requirements, according to Article 68, is to establish and maintain areas for efficient and convenient parking for residential, civic and commercial uses and to provide a safe means for discharging people and products from ground transportation.

(45) **Regardless**, Defendant(s) have allowed the revving of high octane emissions into the immediate vicinity of Plaintiff's presence and adjacent property.

(46) The parking areas for 2 or more vehicles must be designed to prevent or discourage cars from backing out into a public street, or public alley, in order to leave the area or to maneuver out of the parking space.

(47) **Regardless**, the ingress and egress of Defendant's vehicles have become a

designated entrance onto Plaintiff's property through reckless disregard for safety.

(48) The doctrine of vested rights in Oregon derives from Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973) and its progeny, which explain the vested rights doctrine as applied in Oregon.

(49) The court articulates the test for determining whether an inchoate nonconforming use had vested:

“The test of whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are:

- the 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

(50) Thus, in the instance case of Plaintiff's view, it is appropriate to apply the code provisions governing nonconforming uses to vested rights and as long as a vested right has not been realized through actual use (here, the completion of the accessory/structure/residential dwelling **without applications**), it is not subject to nonconforming use treatment.

(51) In sum, this Plaintiff argues that "the legislature recognizes two related but distinct set [sic] of rights--the vested right of a property owner to build a development under a certain set of regulations [quoting statutes], versus the right of a property owner

to use of the property (ORS 215.130), even though the use or structure no longer conforms to the existing regulations.

(52) In distinguishing between the determination of vested rights under *Holmes* and the determination of existing nonconforming uses, the court quoted the restatement of *Holmes* in *Eklund* as well as a portion of a law review article that identified, based on review of Oregon cases, four factors that bear on existence of a nonconforming use and seven factors relevant to vested rights.

(53) The Supreme Court's decisions in Holmes and Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981), comport with the "allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted." *Holmes*, 265 Or at 197.

(54) It characterized *Holmes* as addressing "the degree of development which must exist before an owner of partially developed property can be said to have established a 'lawful use' of property under the statutes, so as to use the property as intended even though the use would not be permitted under the zoning law which became effective while the property was being improved." *Martin*, 292 Or at 80.

(55) The court in *Martin* treated the right to continue development and use the property as a "vested right" but, at the same time, considered the question of whether the landowner had abandoned the right to use the property under ORS 215.130.

### **ORDINARY CARE**

(56) The applicable standard, if any, is "ordinary care" and not "substantial efforts" to complete. Conversely, neither ORS 215.130 uses the term "substantial efforts."

(57) *Holmes* and its progeny treating vested rights as an extension of the principles

underlying nonconforming uses, *i.e.*, as an inchoate nonconforming use, and not as a distinct entitlement that is immune from all limitations imposed on nonconforming uses.

(58) A vested right is the right to complete and implement a inchoate nonconforming use and, thus, is subject to any restrictions governing nonconforming uses imposed or authorized by statute or common law.

### **GOOD FAITH**

(59) What circumstances must occur or, more precisely, what period of time must elapse before failure to continue development of a nonconforming use results in loss of vested right?

(60) Oregon confers nonconforming use status on partially completed projects where there is requisite good faith reliance coupled with expenditures. The good faith of the property owner in making expenditures to *lawfully* develop his property in a given manner; (Original emphasis.)

(61) Plaintiff contends in the course of holding that possession of a “MECHANICAL” permit is not sufficient in and of itself to grant a vested right to proceed and finish with construction of a use. In other words, statutory provisions governing nonconforming use rights apply to substantially completed buildings as well as the use of existing buildings.

### **NOTICE OF ANY PROPOSED REZONING**

(62) The amount of notice of any proposed re-zoning has been consistent to Klamath County Codes and state statutes since 1972.

(63) Accordingly, under Chapter 4, Article 40, section 40.001 for the designation of single family residential zones, as used in this Ordinance, shall include the following for RD 20,000 Intent:

(64) The single family residential zones are established to provide for single family residential areas and development for purpose of single family living including the necessary appurtenant and accessory facilities and uses generally associated with this form of land use.

(65) The 1972 Klamath County Code, Article 47, for a RD 20,000 Zone was intended as a residential single family zone and is similar today:

(66) “This zone is intended to provide for single family dwellings, not more than one permitted on any lot to insure an environment conducive to single family residential living. Additional uses necessary and incidental to a single family residential dwelling are also permitted.

(67) Further, the principal uses for buildings, structures and lands shall be used and structures shall hereafter be erected, altered or enlarged only for the following uses, plus such other uses as the Board of County Commissioners, by resolution, may deem to be similar to those uses listed and not obnoxious or detrimental to the public health, safety and welfare“ (Those uses permitted in the RD 5,000 Zone contained in Section 42.002.

(68) “accessory buildings and appurtenances normally required in conjunction with the conduct of a permitted use. Guest house-Single family dwellings. And, “USES EXPRESSLY PROHIBITED-multiple family residential, commercial and industrial.)

(69) Section 47.005 **PROPERTY DEVELOPMENT STANDARDS (1972)**

C. Yards - The "Yard" provisions of the RD 5,000 Zone, Section 42.005, shall apply except that the required...

D. Building Heights -The "Building heights" provisions of the RD 5,000 Zone, Section 42.005, D., shall apply.

(70) While the current setbacks may have changed, Section 42.005 provides the property development standards of 1972 and indicates that for “yards“, the side yard *shall* have a side yard of not less than five (5) feet *except* as follows:

- An accessory building used for garage purposes, whether attached or detached to the main dwelling unit having direct access from a side street shall be located *not less than twenty-five (25) feet* from a side property line abutting a street.
- An accessory building used for garage purposes whether attached or detached to the main dwelling unit having direct access from a side alley shall be located *not less than twenty-five (25) feet* from the opposite side of said alley.
- Buildings greater than one story in height shall have side yards increased 2-1/2 feet for each story or fraction thereof above the first story.

(71) Thus, ORS 215.130(4) (1977) provided:

"The *lawful use* of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted when necessary to reasonably continue the use without increase and alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use."

(72) According to LUBA, that statute distinguishes between alterations that a county "may" permit and those it "shall" permit: "The latter are limited to alterations 'necessary to comply with any lawful requirement for alteration in the use.' ORS 215.130(5).

(73) Significantly, the 'lawful requirement' must be 'for alteration in the use.' That modifier suggests that it is not sufficient that some authority impose a general legal

obligation on the nonconforming use owner; the authority must require the requested 'alteration [in the] use.'" Cyrus, 46 Or LUBA at 709.

(74) Therefore, in this instant case, the conveyance of the .50 acre subject property in 1990 effectively rendered the use of the accessory/structure/residential dwelling **unlawful**, because the putative vested right was for a dwelling on a parcel not exceeding a single-family dwelling, as allowed under the Suburban Residential (RS) zone, not for multi-family dwellings, and is not a permitted use under the RS zone.

### **RELIANCE**

(75) Expenditures made prior to the subsequent zoning regulation show that the property owner has gone beyond mere contemplated use and has committed the property to an actual use for the passage of new zoning regulations. Plaintiff contends Spangler(s) predecessor expended the funds for the accessory/structure/residential dwelling in bad faith since they were expended to hide illegal activities such as residential occupancy.

### **EXPENDITURES**

(76) The extent to which the expenditures relate more to the nonconforming use than to the conforming uses considered in determining the existence of a vested right were made at a time when the proposed development required approvals, or at a time when required approvals were given.

(77) The evidence in this instance case proves the existence, continuity, nature and extent of the use for 1990-2008 year period preceding any application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning

ordinance or regulation was adopted and has continued uninterrupted. (See also Crone v. Clackamas County, 21 Or LUBA 102 (1991))

(78) Apparently, in this instant case, expenditures are "substantially and directly" related to further dividing the parent parcel. See also Lung v. Marion County, 21 Or LUBA 302 (1991) where evidence that at a time when development was allowed, a landowner placed two homes on the parent parcel and obtained two septic, plumbing and well drilling permits for such parcel, at best, establishes that the landowner contemplated creating two parcels from the parent parcel.

### NONCONFORMANCE

(79) Even if there was an extent of the nonconformity of the proposed use as compared to the uses allowed in the subsequent zoning ordinances, ORS 215.130(5) is direct legislative authority for the county code provisions controlling nonconforming uses. That statute provides, in part, that the "lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued."

(80) As relevant here, the county implemented ORS 215.130(7)(a) ) states that a nonconforming use as described in subsection (5) provides that, if "a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption." Sabin v. Clackamas County, 20 Or LUBA 23, 31 (1990) (a nonconforming use can be "discontinued" by nonuse for a specified period, regardless of intent).

(81) Plaintiff contends repetitiously, a person has a right, pursuant to subsection (5) of ORS 215.130, to continue a nonconforming use of land, so long as that use was lawful

before a change in zoning made that use nonconforming. Under subsection (7), that use, if discontinued, may not be resumed unless certain requirements are met. Seemingly, the Spangler(s) are attempting to overturn the zoning ordinances to comply more with a multi-family zoning area instead of a single-family zoning area while adversely crossing over Plaintiff's property line. See Polk County v. Martin, 292 Or 69 74-76, 636 P2d 952 (1981) (holding that ORS 215.130(5) protects lawful uses that existed at the time a zoning restriction became effective).

(82) Plaintiff contends Spangler(s) predecessor was entitled to file a new application for verification of a nonconforming use before two years had passed for the final determination of an existing obligation of the previous application. The text is clear.

(83) However, according to Klamath County Code, Article 13.010, paragraph C, a building, structure, or portion thereof which lawfully existed prior to July 1, 1990 and which does not conform to the requirements of this code such structures may be nonconforming as to height, setback or similar requirements of the zone.

(a) 13.020 (A) A lawfully created nonconforming lot or parcel, as defined by this code, shall retain that status until the lot or parcel is made conforming. Such a nonconforming lot or parcel shall be entitled to the same rights that such a lot or parcel would otherwise have, but shall meet development requirements of this code.

(b) (B) Lots or parcels may become nonconforming as a result of changes in zoning, but nonconforming lots or parcels shall not be created through the granting of a variance, conditional use and permit, or other development permit.

(c) 13.030 - Nonconforming uses in existence as of November 15, 1990, may continue (including a change of zone or occupancy) subject to the following provisions:

(d) A. When a nonconforming use is interrupted or abandoned for a period of one year, the use shall not be resumed. After any such interruption or abandonment, the use of the site must conform to all applicable requirements of this code. "Abandonment", as used in this section, refers to the cessation of operation;

(e) B. If the level of activity of a nonconforming use is decreased, it shall not be permitted to increase to its original level;

(f) C. No change of a nonconforming use or a structure associated with a nonconforming use shall be permitted which would result in increased noncompliance with this code or greater impact on adjacent and surrounding land uses.

(84) In a case of a vested right to complete nonconforming use as a subject to loss through abandonment or discontinuance in the same manner that a nonconforming use is subject to loss, check out Fountain Village Development Co. v. Multnomah County, 176 Or App 213, 31 P3d 458 (2001), where the owner began construction of a log cabin on top of the bunker sometime before March 1987. Because the owner lacked a building permit for the construction, Multnomah County issued a "stop work order." By March 10, 1987, the landowner applied for, and was issued, a building permit for the log cabin construction. Work on the cabin continued, but it was not finished.

(85) After 1987, there was no further construction, and there were no further expenditures toward construction. In 1991, a renewed building permit issued, but no construction was undertaken under the renewed permit. LUBA characterized the 1987 permit as having expired.

(86) In 1995, petitioner spent some \$3,000 to clear soil off the bunker, construct a road to the site, and hire an engineer to review the integrity of the uncompleted log cabin. Petitioner made no efforts to complete the cabin for occupancy because interest rates for second-home loans were then unfavorable. Between 1995 and 1998, petitioner cleared brush, replaced broken windows, and maintained the roof, but did not perform any work to complete the cabin. Petitioner applied for a loan to complete the cabin in 1998 when interest rates fell.

(87) On September 24, 1999, petitioner asked the county for a legal status determination regarding the cabin. The county issued an administrative decision, which concluded that petitioner had no vested right to complete and use the cabin. The administrative decision treated the residential use as a nonconforming use and said the use had been abandoned or discontinued under the county code.

(88) The decision relied on MCC 11.15.8805(B), which provides:

"If a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption."

(89) As support for that conclusion, LUBA invoked *Clackamas County v. Holmes*, 11 Or App 1, 501 P2d 333 (1972), rev'd on other grounds 265 Or 193, 508 P2d 190 (1973), for the proposition that "Oregon courts have consistently treated a vested right as a nonconforming use that differs primarily in that the landowner need not establish 'actual use.'" (*Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 936 P2d 990 (1997). ORS 215.130 says that nonconforming uses are subject to abandonment. )

(90) Consequently, LUBA next considered whether the petitioner's failure to continue development of the cabin resulted in loss through "discontinuance."

(91) In that regard, petitioner argued that its maintenance of the cabin precluded any finding of discontinuance. LUBA rejected that argument and, in doing so, apparently sustained the county's determination that there was a "discontinuance of substantial effort to finish the development" over the requisite two-year period:

"According to petitioner, because MCC 11.15.8805(C) allows a nonconforming use or structure to be 'maintained with ordinary care,' such maintenance during a period of time negates a finding of discontinuance during that period. We disagree. The county's decision views a vested right to

complete a partially completed building to be lost if there is 'discontinuance of substantial effort to finish the development' over the requisite two-year period. There is no dispute that petitioner's actions in maintaining the site over the period 1995 to 1998 did nothing to finish the development."

## CONCLUSION

Plaintiff incorporates paragraphs 1-91 herein.

(92) During the course of several years, several incidents took place with Defendants Mona Richardson and Gary Richardson, occupants of said property. These Defendants intended expressive conduct to threaten Plaintiff, and who also have the means to carry out that threat.

(93) Defendants, Mona Richardson and her son, Defendant Gary Richardson had intentionally, knowingly or recklessly engaged in repeated and unwanted contact with Plaintiff, thereby alarming Plaintiff, and that it was objectively reasonable for Plaintiff to have been alarmed. They engaged in other conduct which might aid in the commission of the use of actual force or threatened the immediate use of physical force against Plaintiff.

(94) Plaintiff appealed directly to her unruly neighbors -- who live below its rules of order and their sense of reason in terms of liability. Bad neighbors are like perpetual doses of bad karma because their rotten habits -- which may range from being noisy and nasty in attitude to sloppy and seedy in home upkeep -- can bring bad luck in the form of lower property values for good neighbors.

(95) In sum, Defendants' view may be that Oregon case law squares with a vested right to proceed with development and completion of a nonconforming use are immune from the controls authorized under ORS 215.130. Rather, the available Oregon precedent

strongly implies the contrary.

(96) Not only is living next door to irresponsible, impossible and irritating people, it can be costly for homeowners who maintain their houses in the hope of one day selling for considerably more than they paid. And sometimes there is either no sale at all or one that comes much later than anticipated. All are negatives associated with neighboring property by adjusting the listing price to reflect what economists call the 'negative externality.'

(97) Defendant's resolution is "presumptive evidence" and under ORS 35.235(2), the accessory/structure/residential dwelling was not planned or located in a manner which has been the most compatible with the greatest public good and the least private injury.

(98) The illegal land use of multi-family dwellings in the single family suburban residential zone by Defendant's, Carroll and Patricia Spangler is not compatible and consistent with local and state rules, regulations, statutes, and ordinances in the State of Oregon.

(99) Contrary to the intent, the bad faith land use for mandatory conditions of the applicable development ordinances, law and policy, were expended to hide illegal activities and have resulted in disparate results. Therefore, plaintiff should prevail.

WHEREFORE, Plaintiff requests that this court:

(100) Find violations of ordinances or regulations according to Chapter 215-County Planning; Zoning; Housing Codes, section(s) 185-190 that: No person shall locate, construct, maintain, repair, alter, or use a building or other structure or use or transfer land in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.438. [1955 c.439 §9; 1963 c.619 §13] and,

(101) Remand this case to the Klamath County Community Development Building and Planning Commissioner or the proper representative power to enter upon the land per Code 215.080 for a complete inspection and a due diligent investigation.

(102) Order remedies for unlawful structures or land use according to 215.185; a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use.

(103) Order Defendant(s) Carroll and Patricia Spangler to pay Plaintiff, Cosma, general damages, compensatory damages, special damages, attorney's fees, costs of suit, exemplary damages, future damages, implied damages, punitive damages, reliance damages, nominal damages, incidental damages, consequential damages, foreseeability of damages, liquidated damages, mitigation of damages, lost profits from businesses and investments, lost earnings, damages for emotional distress and mental anguish, injunctive relief for the first and second cause of action in the amount of **\$10,000.00**.

I, Kini Cosma, hereby declare under penalty of perjury of the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Date:

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Kini Cosma, Plaintiff