



November 14, 2014

Mayor Arthur Babitz  
City Council  
City of Hood River  
211 2<sup>nd</sup> Street  
Hood River, OR 97031

Re: Walmart Remand Proceedings

PO Box 1544  
Hood River, OR  
97031  
[www.hrvrc.org](http://www.hrvrc.org)

**President**

Polly Wood  
541-490-5443

**Executive Director**

Heather Staten  
541-490-5225

**Board Members**

Ron Cohen

Peter Cornelison

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Scott Franke

Judie Hanel

Jeff Hunter

Nick Kraemer

Larry Martin

Mike McCarthy

Dear Mayor Babitz and Council Members:

The City Council has two questions before it:

1. Does HRMC Chapter 17 (Non-Conforming Uses and Structures) apply to Walmart's proposed expansion?
2. Has Walmart's vested right to expand their store expired pursuant to HRMC 17.05.020 (2)?

The Hood River Valley Residents' Committee believes the answer to both questions is YES.

Vested rights are a way to address a basic issue of fairness: it is unfair to change the rules in the middle of the game. A landowner who does their due diligence, starts a project and makes a good faith effort to follow the rules in place at the time their project is initiated has the right to finish the project under the same rules. That is not the situation here. Walmart was not interrupted in their project mid-construction. Instead, over 19 years elapsed between initial construction and Walmart's assertion of a vested right to complete an expansion.

Over those 19 years, the City of Hood River has made significant changes to its code. Each of these code changes should have been a trigger for action by Walmart in order to preserve their vested right to expand:

- In 1997, Wal-Mart became a non-conforming use when commercial uses were disallowed in the Light Industrial zone. At the time, the Non-Conforming Use Chapter had a specific provision which put an expiration date on vested rights:

*17.05.010 Non-Conforming Uses E. Nothing contained in this title shall require any change in the plans, construction, alteration, or designated use of a structure for which a permit has been issued by the City and construction has commenced prior to the adoption of the ordinance codified in this title, provided the structure, if non-conforming or intended for a nonconforming use, is completed and in use within two (2) years from the time the permit is issued.<sup>1</sup>*

<sup>1</sup> *City of Hood River Zoning Ordinance, 1997*. Identical wording is contained in Ordinances 1488 (1980) and 1535 (1983), which was the zoning ordinance in place in 1991 when Wal-Mart's site plan was approved.

- In 1999, the City enacted the “Housekeeping Ordinance” that resulted in today’s Non-Conforming Use Chapter HRMC 17.05:

*“A use that was legally allowed when established, but which is no longer permitted in the zone in which it is located, may continue as long as it complies with the following requirements:*

- *EXPANSION - A nonconforming use shall not be expanded or moved to occupy a different or greater area of land, building or structure that the use occupied at the time it became nonconforming.*
  - *DISCONTINUANCE- If a nonconforming use is discontinued for any reason for more than twelve (12) consecutive months, any subsequent uses shall conform to all the regulations of the subject zone.”*
- In 2001, the City passed the “Big Box” Ordinance restricting commercial buildings to a footprint of 50,000 square feet. This ordinance was passed in response to Walmart’s plan to build a new superstore half a mile away on Country Club Road. At the time, some suggested that instead of a new superstore, Walmart should expand their existing store. They did not take any action to do so.

This two-decade-long lapse of construction activity was of great concern to your Council when you reviewed the case initially. And for good reason. Effective land-use planning cannot exist when long-dormant projects exempt from current laws can be resurrected at any time with the assertion of a vested rights claim.

On remand, LUBA asked you to address the long time lag and gave you specific instructions: “If the local government has adopted legislation governing discontinuance of a nonconforming use, that legislation will also apply to discontinuance of a vested right. In the present case, the city has adopted legislation, at HRMC 17.05, which provides that a nonconforming use is lost if discontinued for any reason for more than 12 consecutive months.”

Since the City of Hood River *has* adopted legislation governing discontinuance of a non-conforming use, it must also apply the same regulation to discontinuance of a vested right. The Oregon Courts’ holdings in two similar vested rights cases-- *Fountain Village v. Multnomah County* and *Crosley v. Columbia County*—provide good direction for the Council’s decision-making and provide assurance that a decision that Walmart’s vested right been lost through discontinuance would be upheld.

A decision that Walmart’s vested right has not expired would be harder for the City to defend. While LUBA affords great deference to local government decisions, those decisions must be made within certain parameters. The local government interpretation must be plausible under the rules of statutory construction and the decision must be consistent with the express text, purpose and policy of the land-use regulation (ORS 197.829). The legislative history of the Non-Conforming Use Chapter 17.05 clearly shows that the Council enacting the ordinance in 1999

made a policy decision to prohibit expansion of non-conforming uses. Additionally, HRMC 17.05.010 contains the following purpose statement:

*The purpose of this chapter is to permit nonconformities to continue, but not to encourage their perpetuation, and to ultimately bring all uses, buildings and structures into conformance with the ordinance and the Comprehensive Plan.*

It is difficult to see how a decision to allow an expansion of Walmart's non-conforming use would be consistent with the express text, purpose or policy of HRMC 17.05.020 (2).

You should be concerned with the notion that vested rights cannot expire. Such a notion provides not only a loophole in your code but one without any timetable. Vested rights become the ultimate "get out of jail free" card from land use regulations that can be exercised at any time at the whim of the property owner. More troubling --since vested rights run with the land rather than being personal to an individual owner-- a vested rights claim might be invoked by a subsequent property owner many, many years from initial construction. This leaves the city with a great deal of uncertainty--you don't know how many possible vested rights claims are out there or when they might be exercised. Without any "diligence" demands upon property owners with vested rights claims, they could build now, or they could sit on their vested right and decide to exercise it 10 years from now, or even sell the property to a new owner who doesn't decide to invoke the right to build until 20 years from now.

The "expiration date" provided by the discontinuance section of HRMC 17.05 effectively reserves the vested rights avenue for the kind of projects that it was created to protect i.e. projects which really *were* interrupted mid-construction by a rule-change.

We urge you to deny Walmart's request because their vested right to expand their store has expired due to a discontinuance of more than 12 months of construction activity.

Best regards,

Polly Wood  
President

Heather Staten  
Executive Director

