To: Interested Citizens, State Agencies & Local Governments
From: Ralph Bloemers, Staff Attorney - Crag Law Center
Re: Transition to Measure 49 & Vested Rights
Date: November 9, 2007

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I. Introduction – Transition from Measure 37 to Measure 49 & Vested Rights.

The voters of Oregon have passed Measure 49, which was referred to the voters by the Oregon House and Senate as House Bill (HB) 3540. Measure 49 amends ORS 197.352 (commonly known as Measure 37) and provides two new options for property owners with a valid claim under the law. Measure 49 allows that a property owner who has obtained a valid waiver under the original version of Measure 37 may "complete and continue the use described in the waiver…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 [the Bill]." Section 5(3) of HB 3540.

The concept of "vested rights" is linked to the idea of "nonconforming uses." Laws passed by the Oregon Legislature allow existing uses and buildings that do not conform to new land use regulations to be continued as "nonconforming uses." Because compliance ("conformity") with land use regulations is the objective for regulations, the laws allowing nonconforming uses to continue contain various limits on expanding or changing or re-starting a nonconforming use. The concept of "vested rights" has been defined by Oregon courts to address the situation in which a landowner or developer had begun construction of a particular land use, for example a residential subdivision, but before the project was completed a change in land use regulations prohibited that proposed use. The basic idea is that at some point in the course of development, the nonconforming use has come into existence, even if it is not finished, and the use ought to be protected by the laws allowing, but limiting, the continuation of nonconforming uses.

This memo addresses the following two issues: 1) the nature of a common law vested right, and 2) whether a person secured a vested right under the common law since that legislation has been referred to the voters (as of June 15, 2007). *This memo is provided as a public service to assist our clients, the public and decision makers with a proper understanding of the law. All claimants are encouraged to consult their own attorney for specific legal advice.*

To date, the State of Oregon has received over 7,500 claims under Measure 37. Out of this total, local governments and state agencies have issued over 3,000 final orders and decisions to not apply or "waive" applicable land use regulations. The waivers allow property owners to apply for a use of the property which would otherwise have been prohibited by existing land use regulations. As of the end of August 2007, counties had received about 600 applications for permits for development on about 31,000 acres of land in exclusive farm use, forest conservation, farm/forest conservation and range conservation zones. A large share of those applications has been approved. This memo describes the law governing "vested rights" that might have been acquired by landowners who received waivers and/or development approvals under Measure 37.

II. Overview – Authority and Process.

Local Governments and the Department of Land Conservation & Development Have Joint Responsibility to Make the Determinations of Whether a Landowner Has Acquired a Vested Right.

ORS 215.130(5) provides in part: "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." Subsection (8) provides:

> *(8) Any proposal for the verification or alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416. An initial decision by the county or its designate on a proposal for the alteration of a use described in subsection (5) of this section shall be made as an administrative decision without public hearing in the manner provided in ORS 215.416 (11).*

The Oregon Court of Appeals has said: "Just as the regulation of existing nonconforming uses is a matter within a county's authorized land use purview, so too is the regulation of vested rights to develop--which are, in effect, inchoate nonconforming uses.**"** *Fountain Village Development Company v. Multnomah County & Rochlin*, 176 Or App 213, 31 P3d 458 (2001). An earlier decision found that local governments not circuit courts had the authority to decide vested rights cases, and that since such actions were "land use decisions" appeals from those local determinations were within the jurisdiction of the Oregon Land Use Board of Appeals. *Forman v. Clackamas County,* 63 Or App 617; 665 P.2d 365 (1983).[1]

Under Measure 37, the Department of Land Conservation and Development ("DLCD") had concurring authority with the local government to review demands for compensation/wavier. Under Measure 49, DLCD has been given the authority to obtain information from all M37 claimants. DLCD will be seeking, under section 8(1), information that would substantiate any assertion of a vested right under Measure 37. DLCD, in addition to the pertinent county, will be seeking information to show whether the claimant has a vested right to complete a nonconforming use that would violate state land use law.

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[1] The exact process and roles for the local county, the DLCD and other parties wishing to advance a vesting claim or challenge a vesting claim is not provided in Measure 37. Measure 49 does provide that a claimant can complete a Measure 37 development, if the landowner has acquired a common law vested rights is specified in subsection 5(3) of Measure 49. Under Subsection 4(7) "A decision by a public entity that an owner qualifies for just compensation under sections 5 to 22 of this 2007 Act and a decision by a public entity on the nature and extent of that compensation are not land use decisions." In other words, the matter appears to be reviewable by Oregon's circuit courts. A determination of a "common law vested right" appears to be a decision on "nature and extent of just compensation" under Measure 49. Other remedies at law or in equity may be available for concerned neighbors, including a declaratory judgment action or a writ of mandamus. In addition, DLCD has authority to obtain information and exercise its jurisdiction over any order it issued under Measure 37.

Throughout the time when Measure 37 was in force, DLCD required that it decide whether a M37 claimant is entitled to a waiver of state law. *See* August 24, 2005 Letter from Stephanie Striffler to Lane Shetterly *and* OAR 660660-041-0040 (addressing DLCD authority over waivers). Just prior to the passage of Measure 49, the DLCD issued a questionnaire that contains guidance on how DLCD intends to process this matter if Measure 49 passed. www.oregon.gov/LCD/MEASURE37/docs/general/M37-M49_Q-A_101507.pdf. In this document, the State (through DLCD) has provided helpful guidance for a person that wishes to attempt to establish a vested right to complete a use. If the person is able to meet the following tests:

1. The amount of money spent on developing the use in relation to the total cost of establishing the use;

2. The good faith of the property owner;

3. Whether the property owner had notice of the proposed change in law before beginning the development;

4. Whether the improvements could be used for other uses that are allowed under the new law;

5. The kind of use, location and cost of the development; and

6. Whether the owner's acts rise beyond preparation (land clearing, planning, etc.).

The person who can meet these criteria may be able to establish a vested right. These six factors are discussed in detail below in the context of the transition from Measure 37 to Measure 49.

III. Analysis - Vested Rights Not Available for Uses Not Permitted by Measure 37.

Measure 37 did not authorize any development on any land, but only development that was authorized at the time the landowner acquired the property *and* that did not fall within regulations exempted from Measure 37. Specifically, Oregon Revised Statutes 197.352(3) (Measure 37) stated in part that its provisions:

> *"shall **not** apply to land use regulations:*
>
> *(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this act;*
>
> *(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;*

(C) To the extent the land use regulation is required to comply with federal law..."

The exemption for laws that reflect, historic, common law nuisance exemptions overlaps with the public health and safety exemption. The public nuisance exemption includes any laws and regulations that prohibit one landowner from using his or her land in ways that prevent a neighboring landowner from being able to use their property. Laws prohibiting the generation of large amounts of dust, noise, vibration, bright light at night or could fall within this exemption as would regulations prohibiting or limiting certain dangerous or hazardous uses of property, including the production or use of explosive or flammable materials or liquids.

For this reason landowners who may have vested rights under Measure 37, cannot acquire vested rights to waive regulations prohibiting or restricting development:

- In natural hazard areas, such as fire prone or floodway areas, are exempt from Measure 37 claims and cannot be waived
- In areas that do not have proper soils or facilities for sewage disposal are exempt from Measure 37 claims and cannot be waived.
- That may generate traffic safety problems, are designed to protect public safety and therefore cannot be the basis for a Measure 37 claim or be waived.
- In groundwater limited areas, may be exempt from Measure 37.
- For a dangerous or hazardous activity, such as manufacturing explosive or dangerous chemicals.
- That generate noise and dust that would constitute a public nuisance and or health hazard, including aggregate mining.

Ballot Measure 37, (ORS 197.352), includes an exception for land use regulations "[t]o the extent the land use regulation is required to comply with federal law." ORS 197.352(3)(C). For more information on these issues visit the Crag Law Center's Measure 37 to Measure 49 help page. This issue is discussed in greater detail in two Citizens' Guides to Measure 37 claims that are available at www.crag.org/justcompensation.php. As one observer aptly put it, "Measure 37 was simplistic, not simple." The structure and function of the original ORS 197.352 is the subject of well-over 300 lawsuits. In some cases, the Court's have issued legal decisions. These decisions all wrestle with its inconsistent language, typographical errors and ill-defined legal concepts. These decisions span many more pages than the plain language of Measure 49. The point of including this brief discussion here of one's rights under Measure 37 is to highlight that Claimants that proceed with Measure 37, continue down this, as yet, largely undefined and uncertain path.

Measure 49 on the other hand was written to sync up with existing law and provide transferability and certainty for landowners. Unlike Measure 37, Measure 49 just compensation provision was written to capture the principle of just compensation in plain language.

IV. Analysis – Vested Rights Not Transferable.

Only the landowners who actually received a final Measure 37 waiver can acquire a vested right to develop the property. The owner cannot transfer to another person a vested right to develop. A person who had no right to a waiver under Measure 37 cannot acquire a vested right to develop under Measure 49. *See Crook County v. All Electors*, Crook County Circuit Court No. 05CV0015 (August 1, 2005 letter opinion) (limitations on transferability, confirmed by Jackson County decision and analyzed and addressed in February 24, 2005 letter from Attorney General). Oregon Circuit Court decisions have defined who was entitled to receive a waiver under Measure 37 and who was not. Persons not qualified to have received a waiver under Measure 37 are not entitled to a vested right to complete a project initiated by someone else who may have had a valid claim.

For example, the spouse of a Measure 37 claimant cannot acquire a vested right based on a waiver that reflects the date when claimant acquired the property but before the spouse him or herself actually acquired a property interest. *Schaffer v. Marion County et al*; Marion County Circuit Court, case number 05C16991 & 05C21655, decided June 21, 2006, posted at http://www.doj.state.or.us/hot_topics/pdf/measure37/schaffer_decision.pdf For example, if Mary acquired property in 1968 and married Bob in 1986 and then deeded half her interest in the property in 1989, Bob is not entitled to use Mary's waiver, based on her 1968 ownership, to acquire a vested right to develop the property.

A person whose only interest in the property being developed is as a contract seller of the property cannot acquire a vested right to complete the development because that person does not qualify as an "owner" of property under Measure 37. *Burke & Educative LLC v. State of Oregon*, Case No. CV 06060231, decided: June 22, 2007, posted at: http://www.doj.state.or.us/hot_topics/pdf/measure37/burke_decision.pdf; *Fairclo v. State of Oregon,* Klamath County Circuit Court No. 06-1634 CV, decided: September 7, 2006, posted at http://www.doj.state.or.us/hot_topics/pdf/measure37/fairclo_decision.pdf

A landowner whose only interest in property is that of a beneficiary of a revocable trust cannot acquired a vested right to complete a Measure 37 development. *Smith v. State of Oregon et al.*, Yamhill County Circuit Court CV 060239, decided February 8, 2007 at http://www.doj.state.or.us/hot_topics/pdf/measure37/decision_randy_smith.pdf; *Rohde, Alfred, et al v. State DAS, DLCD, LCDC*, Marion County Circuit Court 06C19406, M12250, decided May 16, 2007 at: http://www.doj.state.or.us/hot_topics/pdf/measure37/rohde_decision.pdf. Likewise, a member of a limited liability corporation that holds property does not qualify as an "owner" of property under Measure 37 and is, therefore, not entitled to a vested right to complete the project.

V. Analysis – Date of Claim Determines Availability of Right.

Measure 49 modifies Measure 37 claims and removes the ability for property owners to pursue a claim based on regulations enacted before January 1, 2007, unless the claim was filed by June 28, 2007. HB 3540 Sections (5), (12). Therefore, a landowner cannot acquire a vested right to develop property based on waivers dated after June 28, 2007.

VI. Analysis - "Vested Rights" and "Nonconforming Uses."

"Vested rights" is a principle derived from the concept of "nonconforming uses." A non-conforming use is "one which *lawfully existed* prior to the enactment of a zoning ordinance and which may be maintained after the effective date of the ordinance although it does not comply with the use restrictions applicable to the area." *Clackamas Co. v. Holmes*, 265 Or. 193, 197 (1973) ("*Holmes*"). "Furthermore, a nonconforming use is, by its very nature, a use which has been determined to be contrary to the zoning plan…" *Bergford v. Clackamas County*, 15 Or. App. 362, 367, 515 P.2d 1345, 1347 (1973). Even though nonconforming uses may be continued despite their violation of subsequently enacted land use regulations, their continued lawful existence is subject to a number of limitations, including forfeiture,[2] restraints on alteration,[3] and required disclosure to subsequent purchasers to avoid potential fraud claims.[4]

"Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan." *Clackamas County v. Portland City Temple*, 13 Or. App. 459, 452, 511 P.2d 412, 413 (1973) *citing Parks v. Board of County Commissioners of Tillamook Co.*, 11 Or. App. 177, 196, 501 P.2d 85, 95 (1972). The Court of Appeals held that a property owner was not entitled to proceed with construction prohibited by amendment to a zoning ordinance by mere possession of a building permit issued before the zoning ordinance went in to effect. *Twin Rocks Watseco Defense Committee v. Sheets*, 15 Or. App. 445, 516 P.2d 472 (1973). "In general, a permit or license does not create irrevocable rights, but, instead, is subject to modification or revocation by subsequent changes in the law." *Id.*

The Oregon Supreme Court has said that "when development has reached a certain stage," the property owner has acquired a vested right "to continue the development and subsequently to put the use to its intended function." *Clackamas Co. v. Holmes* 265 Or. 193, 197 (1973). Oregon's appellate courts have outlined five requirements to be considered in determining if a vested right has been established: (1) the ratio of prior expenditures to the total cost of the development, (2) the good faith of the landowner in making the prior expenditures, (3) whether or not the landowner had notice of any proposed zoning or amendatory zoning before starting his or her improvements, (4) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (5) the nature of the project, its location and ultimate cost. *Clackamas Co. v. Holmes* 265 Or. 193, 197 (1973); *Eklund v. Clackamas County*, 36 Or. App. 73, 81 (1978), *overruled on other grounds by Forman v. Clatsop County*, 63 Or. App. 617 (1983), *aff'd* 297 Or. 129 (1984).

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[2] *See* ORS 215.130(7)(a) (stating that a nonconforming use "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").

[3] *See* ORS 215.130(9) (stating that the alteration of a nonconforming use is impermissible unless the change in the use, structure, or physical improvement causes "no greater adverse impact to the neighborhood").

[4] *See Heise v. Pilot Rock Lumber Co.*, 222 Or. 78, 86, 352 P.2d 1072, 1076 (1960) *quoting Musgrave v. Lucas*, 193 Or. 401, 238 P.2d 780 (1951) (stating that "actionable fraud may be committed by a concealment of material facts as well as by affirmative and positive misrepresentations").

A. There Can Be No Vested Right to Develop Without Development Permits

In order to develop property, a landowner must have all necessary permits, because development carried out without necessary permits is illegal. Oregon Revised Statutes 197.175(1)(d), 215.190 ("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."). A building permit by itself, without substantial development based on that permit, is not enough to establish a vested right. *Twin Rocks Watseco v. Sheets*, 15 Or App at 451.

If subsequent permits are needed to authorize subsequent development then there can be no vested right to complete a project that has not received all of its necessary approvals. *Mason v. Mountain Rivers Estates*, 73 Or App 334; 698 P2d 529 (1985). In projects requiring phased approvals, a court is not likely to count expenditures begun under the authority of one permit against final construction costs that required other, later permits.[5]

B. Substantial Investments to Develop Beyond Preparation.

As noted above, the Oregon Supreme Court considers the ratio of the good faith expenditures to the total project cost in determining whether a vested right to complete a nonconforming use has been established. The courts have not settled on what constitutes "substantial investment." In two decisions, the Oregon appellate courts have found a vested right when the claimant has spent about 7% of the total development cost. *Clackamas County v. Holmes*, 295 Or at 199; *Cook v. Clackamas County,* 50 Or App 75, 622 P.2d 1107 (1981)

In another decision, the claimant spent $110,000 over six years to develop a subdivision, more than three times the $33,000 spent by the claimant in the *Holmes* case: "Applying the ratio test here, we are able to say only that construction of 250 houses is obviously a multimillion dollar proposition, and that the ratio of prior expenditures to the total cost of the project is far less favorable to a vested right than the 1:14 ratio in *Holmes*, where the court found a vested right based on the prior expenditures plus other factors which weighed in favor of the nonconforming use. The ratio test does not favor plaintiffs." *Webber v. County of Clackamas*, 42 Or App 151 at 155, 600 P2d 448 (1979).

Certain categories of costs are **not** to be considered as part of the ratio:

- **Preparatory investments like land grading, test borings, negotiations with contractors and architects**

[5] The California Supreme Court has held that even "[b]y zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued. *Avco Community Developers v. South Coast Regional Commission*, 17 Cal 3d 785; 553 P2d 546; 132 Cal Rptr 386; 1976

In the *Holmes* decision, the Oregon Supreme Court said that "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. *Washington County v. Stark*, 10 Or App 384, 499 P2d 1337 (1972); *Town of Hempstead v. Lynne, supra; Board of Supervisors of Scott County v. Paaske*, 250 Iowa 1293, 98 NW2d 827 (1959); 1 Anderson, supra, § 6.22; Note, 49 NC L Rev 197 (1970)." *Clackamas County v. Holmes*, 265 Or at 199. In one case, significant and substantial land clearing along with legitimate and authorized expenditures towards the development of a *part* of a subdivision were counted as *part* of a landowners' substantial investment a portion of development if that development *is not inconsistent* with current zoning. *Eklund v. Clackamas County*, 36 Or App 73; 583 P2d 567 (1978).

- **The cost of acquiring the property should not be counted in deciding whether there has been substantial investment.**

The Court of Appeals has said that the cost of acquiring the property should not be counted as part of the claimant's substantial investment: "The term 'vested right' in this context does not pertain to an undifferentiated prerogative *to conduct an activity*; it relates to a prerogative *to use one's land* for the activity. The cost of acquiring the land is not a determinant of whether the owner has made substantial expenditures toward the commencement of the planned activity on the land." *Union Oil Co. v. Clackamas County*, 81 Or App 1 at 7-8, 724 P2nd 341 (1986)

C. Rights Can Only Be Secured for Parts of Project Pursued in Good Faith.

Certain developments are made in phases and the Court of Appeals has found that rights to complete a nonconforming use may be vested only for those parts of the project that have received necessarily approvals and have been the focus of substantial good faith investments. For example, a court found that a claimant had acquired a vested right to complete a subdivision on 440 acres, but not on an additional 220 acres of the project that was not part of the original proposal. *Milcrest Corporation v. Clackamas County*, 59 Or App 177, 650 P2d 963 (1982).

1. Development investments that would support a conforming use, cannot be counted toward vested rights

The Oregon courts have decided that investments that can be adapted to serve a *conforming use*, cannot be used to establish a vested right to complete a *nonconforming use*.

For example, in one case the claimant had incurred $110,000 in expenses in constructing a water tank and water main to support a subdivision of about 250 homes on 127 acres. The Oregon Court of Appeals found that the landowners had not acquired a vested right to develop the subdivision because the claimant could have an adequate return on his investment by using the line to sell water to other developments. *Webber v. County of Clackamas*, 42 Or App 151, 600 P.2d 448 (1979)

In the context of the transition from Measure 37 to Measure 49, any development investments that could be used to serve the lesser number of homes permitted under Measure 49

(up to ten) cannot be used to establish a vested right to develop the additional homes permitted under Measure 37. This is also described as the "adaptability" test.

The adaptability of the existing improvements before Measure 49 was pending will be a key common law factor that guides local and state government review of claims that the owner has vested rights. For development that occurred under a Measure 37 waiver while Measure 49 was pending and is consistent with Measure 49, these developments are likely to vest and transition to Measure 49 the quickest. Per *Holmes*, if building has occurred and good faith has been found for vesting, the use allowed is what is allowed under Measure 49. This principle of adaptability of the use is firmly rooted in Oregon common law. Regarding the fourth factor examined by the court in *Holmes*, whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, the court discussed the case of *Town of Hempstead v. Lynne*, 222 NYS2d 526 (1961). In particular, in setting forth this criterion for vesting the Holmes noted that: "The [*Town of Hempstead*] court found that the landowner had failed to show the expenditure for the widening of the road was accomplished for the exclusive purpose of accommodating the shopping center, because such widening was <u>equally consistent</u> with using the property for residential purposes." *Holmes*, 265 Or at 198. This factor was similarly applied by the Court of Appeals in *Washington County v. Stark*, 10 Or App 384 (1972). In *Stark*, the Court of Appeals concluded that an owner who sought permission to operate an airport on agricultural land had not vested a right to do so despite the owner's construction of a concrete culvert. The court found none of the improvements, including the concrete culvert, were inconsistent with improvements for agricultural use. *Stark*, 10 Or App at 387.

In other words, if there is any good faith development that has occurred but it has not been completed, that development that has been done in good faith will vest towards those uses to which it is adaptable and which are allowed under Measure 49.

2. Racing to Develop the Property in Order to Beat the Provisions of Measure 49 is Bad Faith

The Supreme Court has decided that vesting of a non-conforming use is dependent on, among other things, "the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements." *Holmes* v. *Clackamas County* at 198. Trying to beat the clock is not good faith, but rather is bad faith. Under the Oregon Supreme Court decision in *Holmes*, a Measure 37 claimant who has received a waiver and applied for and received a permit to develop property *may not* take steps to "vest" these rights by developing the property in the interim period. Courts in other states have analyzed what "good faith" means when landowners continue their development in the face of pending legislation.[6] These cases have concluded that the attempt to outrace the effective date of

[6] *See, e.g., Tucson v. Arizona Mortuary,* 34 Ariz 495, 272 P 923 (1928) (holding that actual notice of a proposed zoning ordinance which would prohibit the construction of a mortuary in a residential district precluded any vesting of rights); *Veal v. Leimkuehler* 249 SW2d 491, cert den 344 US 913, 97 L Ed 704, 73 SCt 336 (1952, Mo. App.) (stating that a permittee's good faith was brought into question by evidence that he anticipated change in the zoning regulations); *A. J. Aberman, Inc. v. New Kensington* 377 Pa 520, 105 A2d 586 (1954) (vested rights could not accrue even if a building permit had been issued because amended zoning ordinance had been drafted and was before the city council for passage).

pending land use legislation by commencing construction prior to the legislation's pending adoption is considered "bad faith" and precludes acquiring a vested right to complete the project.

A North Carolina court decided that a corporation that was "fully aware of a community of opposition to the project and of pending legislation, which if adopted, would prevent defendants from proceeding with the project" could not obtain a vested right to construct a proposed apartment project on property which was to be rezoned. *Stowe v. Burke*, 122 SE2d 374 (NC 1961). Given the proposed zone change, the corporation could not act in good faith and incur expenditures to vest, even though the corporation had a building permit. This raises the key question: at what point should an Oregon landowner with a Measure 37 waiver and related permits have become aware that a law superseding Measure 37 might go into effect?

Early 2007: There were many television, radio and newspaper reports about Legislative proposals to modify Measure 37, even before the 2007 Legislature was convened. Attorneys began advising Measure 37 claimant clients about the possibility of a change in the law and provided advice about how to establish a vested right, and then on ***April 12, 2007***: House Bill 3540, which became Measure 49, had its first reading in the Oregon Legislature and the public began to receive notice of this possible change in the law.

June 15, 2007: House bill 3540 receives final approval of the Oregon Legislature and is referred to the voters on *June 15, 2007*. On that date Measure 49 became pending legislation. This date is important, because the Supreme Court of Hawaii used the date at which a referendum was certified, that is, found to have met the legal test for referral to the voters, as the *decisive date* in deciding whether a developer had acquired a vested right to build a project that the successful referendum made nonconforming. Expenditures made after the certification date were undertaken at the developer's risk and could not be counted toward the establishment of a vested right ("zoning estoppel.") *County of Kauai v. Pacific Standard Life Insurance Company*, 65 Haw 318, 653 P2d 766 (1982). The referral of Measure 49 to the voters on June 15 is an analog to the certification of a referral measure.

Summer and Fall 2007: In August and September news stories about the campaigns to pass or defeat Measure 49 were broadcast and published around the state. In October voters received their voter pamphlets containing arguments for and against Measure 49. The common law establishes that Oregon Courts must consider whether claimants had good faith to obtain vested rights. If claimants had had actual notice or personal awareness about Measure 49 this factors into whether the development was made in good faith. In a New Hampshire case, the court held that landowners had "constructive notice" of a proposed zoning ordinance and therefore could not rely on investments made after the date of the constructive notice to establish a vested right. *R.A. Vachon & Son, Inc. v. City of Concord*, 289 A2d 646 (NH 1972).

Claimants considering whether to proceed under Measure 37 will need to satisfy the common law, in other words, those claimants will need to show that they did not know or should not have known about the possibility Measure 37 would be modified by Measure 49. The likely latest candidate date, given both the prior publicity and precedents elsewhere, would be June 15, 2007. Investments after that date may be considered investments intended to beat the clock and therefore not investments made in good faith.

VII. Conclusion

The purpose of this memo is to provide an analysis of these important issues to educate local governments that are interested in ensuring a smooth and orderly transition to Measure 49 The Crag Law Center has been assisting local citizens in their efforts to ensure a fair and balanced implementation of Measure 37. These local citizens are eager to work collaboratively to move Oregon forward now that Measure 49 has been enacted. The DLCD and local counties are beginning the process of transitioning Measure 37 claims into Measure 49 claims. For projects where development is underway, the government agencies and local jurisdictions are well-advised to preserve the status quo and limit their liability by issuing stop work orders until a definitive and prompt resolution of these issues takes place. County agencies that do not order the cessation of activities under Measure 37 to determine vested rights risk violating the law. In assessing these issues, the State and Counties will be facing these three categories of claimants:

Category 1 - Measure 37 claimants with state and local orders and a building permit that had successfully built out their claim before Measure 49 became a pending law (referral of the Measure 49 on June 15, 2007).

Category 2 – Claimants that had little if anything started before the law became pending on June 15, 2007. Yet, despite the referral and the immense controversy leading up to the election, the claimant started building or "racing to vest". All claimants had notice (actual or constructive) of the controversy and the pending change in the law. Claimants that started building in recent months (between June 15 and November 6) are in this category.

Category 3 - Those claimants that have obtained a Measure 37 waiver/order and/or a building permit without doing any construction or any building as of November 7, the date that Measure 49 became an enacted law.

The resolution of Category 1 and Category 3 claimants is straightforward. Per the common law and the DLCD interpretative guidance, Category 3 claimants cannot vest rights under Measure 37. Category 3 claimants could convert to the express track. A claimant in Category 1 may be able to establish vesting, but those claimants must address the question of whether the construction that has occurred is adaptable to the 1-3 permitted by Measure 49 (or 10 homes if, and only if, the claimant can provide actual proof of loss). Category 2 claimants, on the other hand, have not vested their claims. To establish good faith they must be able to prove that they had 1) no notice of the controversy over Measure 37 and of the proposed changes (Measure 49) to ORS 197.352. It is not likely that the claimants in Category 2 will be able to show good faith. Nonetheless, even if a Category 2 claimant can prove that the claimant forward in good faith then the claimant is not likely to be able to vest rights under Measure 37.

As discussed above, the common law highly disfavors the establishment of nonconforming uses, particularly while a change in the law is pending. Regardless, the vesting, if any, is limited by the extent of the *adaptability of the use* for currently allowed uses. The expenditure test, among others, are also applicable to determining vested rights in this context.