

MEMORANDUM

TO: DESCHUTES COUNTY BOARD OF COMMISSIONERS - (via fax to: 385-3202)
JEFFERSON COUNTY BOARD OF COMMISSIONERS - (via fax to: 475-4454)
CROOK COUNTY BOARD OF COMMISSIONERS - (via fax to: 416-3891)

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DATE: November 13, 2007

RE: MEASURE 37 / MEASURE 49

We have had an opportunity to review the memorandum sent to local governments by the CRAG Law Center concerning Measure 37/Measure 49 and the question of vested rights. While there are certainly a lot of correct statements of law in the memorandum, the conclusions reached by the CRAG Law Center are, unfortunately, driven by an apparent desire for a political result rather than a statutory analysis of the plain language in Measure 49.

I. Background

As you know, Measure 37 was adopted in 2004 as an initiative. Measure 37 left a lot to be desired in terms of legal clarity. However, one thing that is clear about Measure 37 is that it is construed to be consistent with other statutes unless those statutes had been specifically modified. The Attorney General's Office, in the case of *Crook County v. All Electors*, noted this in their oral argument before Judge Neilson (see Katherine George's comments from page 97 of the transcript attached hereto). The context of Measure 37 has been reinforced by requirements that claimants follow all existing land use regulations which were not waived and do not affect a devaluation of the property. Examples of this include subdivision requirements as well as the procedural land use processes for each county, even though those subdivision requirements and land use processes did not, in many instances, exist as of the date of acquisition.

One of the provisions in our land use system that was not waived and which Measure 37 must be read within the context of is the statutory vesting provision set forth in ORS 215.427(3).

As you know, common law vesting for new developments was replaced approximately 20 years ago by a statutory vesting process so long as the application conforms with the criteria that was in existence at the time the applications were filed. That is why there is often times a rush to file land use applications before a change in the law. Nothing in Measure 37 changed that statutory vesting process.

Measure 49, however, appears to carve out an exception to the statutory vesting provisions of ORS 215.427(3). In section 5, subsection 3 of Measure 49, the legislature noted that:

A claimant that filed a claim under ORS 197.352 before May 15, 2007, is entitled to just compensation as provided in

...

- (3) a waiver issued before the effective date of this 2007 act 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.

While this section certainly could have been written in a much clearer fashion, it would appear that the legislature adopted a standard by which those who obtained a common law vested right status as of the effective date (December 6, 2007), have a right to complete and continue the use described in the waiver. From our firm's perspective, it is eminently appropriate for Measure 37 claimants who have received land use approval to continue working towards meeting the benchmark established by the legislature;-- that is, obtain a common law vesting status by December 6, 2007. Establishing any date earlier than December 6, 2007, as a date vesting actually is established would be inappropriate.¹ The legislature certainly could have picked an earlier date, such as June 15, 2007, November 16, 2007, or any date in between. The legislature chose not to and instead chose December 6, 2007, as the benchmark for obtaining a vested right status.

The CRAG Law Center has advocated an earlier date. They have not tied that earlier date to any statutory interpretation of Measure 49. An earlier date, in fact, would contradict the plain language of Section 5, subsection 3 of Measure 49 and, therefore, would not be adhered to by any court under a *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993) analysis.

Regarding the issue of transferability, the Attorney General's office has already opined that once a common law vested right status is obtained, developed properties are transferable. In the same transcript (*Crook County v. All Electors*), on page 98, the State Attorney General's Office noted:

"It is not really the State's position that a waiver is never transferable but under existing law there are existing statutes governing nonconforming uses and under the Court's decision under the vested rights principle, when the development of a nonconforming use has

¹ In a recent court case, the Circuit Court for Crook County found that any claim for harm (or benefit) made before the November election on Measure 49 would be speculative.

reached a certain stage, the property owner is said to have acquired a vested right to continue the development and subsequently put the use to its intended function.”

At a minimum, therefore, once an owner meets the substantial investment test to establish a common law vested right, an owner has acquired the right to transfer those properties, i.e., serve its intended function of selling lots for a residential development consistent with the claim and the waivers previously issued. I would note, however, there is an additional argument that that right to transfer vests, under current law, by operation of statute (ORS 215.427(3)). That is, however, probably not going to be the issue before each of your jurisdictions as to the common law vesting.

2. Process

It would appear appropriate for each county to initiate a process for establishment of a vested right. We understand Crook County has already engaged in that process. This would bring clarity and resolution to the issue of vesting by operation of ORS 215.130 and 215.416. It would appear that a process for vested rights would include notice to adjoining owners within 250 feet of a subject property. We would recommend that the application for vesting be fairly straightforward with an itemization for all applicable costs as well as photographs of the subject property. A narrative explaining what steps have been taken to obtain vesting would be appropriate. From our perspective, so long as the expenditures were made and land use approval was made before the effective date of Measure 49, they were presumed to be in good faith.

3. Summary

In conclusion, it would appear from a statutory analysis of Measure 49, that all vesting activity which occurs before the effective date of Measure 49 would be appropriate to consider to determine whether or not an applicant has attained a common law vesting in property. The case law is also clear that all costs attributable to the development of the property, including land use application fees, attorneys fees, engineering fees, as well as hard costs on the development of the property that are attributable solely to the development of a property inconsistent with the new law would be appropriate to consider. If those costs meet or exceed 7% of the total cost of the project, the cases would indicate that a common law vesting has been attained.

We do concur that it would be appropriate for the county to allow for an application to determine vesting and to issue decisions thereunder consistent with the provisions of ORS 215.130, 215.416 as well as the case law for a determination of a common law vesting right. There may continue to be an argument that many of these claimants are already vested by operation of law, to-wit: ORS 215.427(3). Hopefully that issue will be moot by having most of these applications vest under common law under December 6, 2007, in the first place.

1 has been waived, allowing a particular use by a particular
2 applicant, and recorded against a particular property, shall
3 not be applied as a condition of approval in a subsequent
4 land use proceeding filed by that applicant to undertake --"

5 THE COURT: So is the --

6 MS. GEORGES: "-- that use."

7 THE COURT: -- particular particular particular
8 "that applicant" that you're --

9 MS. GEORGES: Right.

10 THE COURT: -- you're relying on?

11 MS. GEORGES: Yes.

12 THE COURT: Okay.

13 MS. GEORGES: -- "that applicant to undertake that
14 use upon that property," end quote.

15 THE COURT: Okay.

16 MS. GEORGES: Section 11(a) that I just read is
17 consistent with the State's argument that a Measure 37
18 waiver is personal to the owner, the Measure 37 claimant,
19 because it only operates as a waiver for that applicant to
20 undertake the particular use allowed by the waiver on that
21 property.

22 Measure 37 also has to be considered in the
23 context of existing laws that are not changed by Measure 37,
24 and this argument here is an illustration of the situations
25 in which a waiver might be transferable, to respond to the

1 arguments. It's not really the State's position that a
2 waiver is never transferable, but under existing law, there
3 are existing statutes governing non-conforming uses, and
4 under the Court's decision, under the vested rights
5 principle, when a development of a non-conforming use has
6 reached a certain stage, the property owner is said to have
7 acquired a vested right to continue the development and
8 subsequently put the use to its intended function.

9 However, the point in the development of the use
10 at which time the owner is said to have acquired a vested
11 right to continue a non-conforming use is an issue of fact
12 to be decided by the courts on a case-by-case basis,
13 applying factors set out by the Oregon Supreme Court in
14 Clackamas County v. Holmes, 265 Or 193 (1973), and Polk
15 County v. Martin, 292 Or 69 (1981).

16 Thus the rights to engage and continue a non-
17 conforming use vest only through actual use or development.

18 Again, the Crook County ordinance, Section (b),
19 which is not challenged here, is again consistent with the
20 State's interpretation --

21 THE COURT: Section (b)?

22 MS. GEORGES: Section (b), 11(b). Section 11(b)
23 says, quote, "A property which has been improved by an owner
24 who has obtained a waiver allowing a use which would not
25 otherwise have been allowed due to an enactment or

1 enforcement of a land use regulation may be transferred with
2 the improvements to the new owner, but this privilege shall
3 not be construed to create authority to transfer the right
4 to improve to a new owner."

5 So under the Crook County ordinance, only the
6 improvements which have actually been made by an owner who
7 has obtained a waiver may be transferred to the new owner
8 because they're improved, they're built, it's there.

9 But that does not transfer the right to improve
10 under the waiver to the new owner under the Crook County
11 ordinance.

12 I don't know why any landowner would want to
13 proceed by applying the vested rights principle or testing
14 that principle when they can instead have some kind of
15 arrangement with the developer so that they retain an
16 interest until development is completed, which seems a much
17 more hassle-free way to see the property fully developed and
18 sold, but nonetheless, if an owner does not choose to pursue
19 that avenue, under common law how much of his development
20 would be transferable at the time of sale and whether or not
21 a new owner could complete his development would be
22 determined under the common law of vested rights.

23 That's how existing law would apply to fill in
24 various scenarios at the time of transfer. The only direct
25 issue here, though, is whether --