To: Interested Citizens, State Agencies & Local Governments
From: Ralph Bloemers, Staff Attorney - Crag Law Center
Re: HB 3540 Referral & Good Faith Requirement for Vesting
Date: July 24, 2007

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House Bill (HB) 3540 has been passed by the Oregon House and Senate and will be referred to the voters this fall. This bill proposes to fix ORS 197.352 (commonly known as Measure 37) and provide two new options for property owners with a valid claim under the law.

Under the first option, or the "homestead" track, a property owner with a valid claim may secure the right to develop up to three home sites without having to establish a specified reduction in value caused by existing land use regulations. Under the second option, or the "conditional" track, a property owner with a valid claim may secure the right to develop up to ten home sites (or a maximum of twenty home sites on multiple claims) so long as the reduction in value caused by existing land use regulations is documented by a valid appraisal.

HB 3540 provides 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.

This memo addresses the following two questions: 1) what is a common law vested right, and 2) can a person secure a vested right under the common law now that legislation has been referred to the voters (as of June 15, 2007).

To date, the State of Oregon has received over 7,500 demands under Measure 37. Furthermore, 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. However, these "waivers" are subject to a laundry list of caveats that raise a number of unanswered legal questions, which includes 1) the extent of the State's responsibility to continue to enforce land use regulations in order to protect public health and safety and 2) the validity of the valuation methodology employed by State agencies and local jurisdictions to determine the scope of the waivers themselves. The Courts will clarify these issues or statutory changes will clarify and provide more certainty on these important issues.

Leaving these and other interpretative issues aside, once the claimant has an order from the local governing body and the State agencies on the demand, the claimant may proceed to apply for a permit to develop the land and begin construction. Under ORS 197.352(8), a property owner who qualifies for and receives a Measure 37 waiver may exercise any use of the property which was allowed at the time the owner acquired the property.

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,[1] restraints on alteration,[2] and required disclosure to subsequent purchasers to avoid potential fraud claims.[3] "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).

Oregon case law on the issue of vested rights, states 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). Four requirements are 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 the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost. *Eklund v. Clackamas County* 36 Or.App. 73 , 81 (1978).

Therefore, under Oregon law, a landowner must establish a number of prerequisites to be able to lawfully "vest" their rights to continue and maintain the non-conforming use and insulate the use from the operation of subsequently enacted zoning regulations. The key requirement for the analysis here is that the commencement of construction of the non-conforming use must be done *in good faith* prior to the effective date of the subsequent land use regulation. *Holmes* at 197-98.

So, what if the claimant has not built anything as of the date (June 15, 2007) when the statutory fix was passed by the Oregon legislature and then referred to the voters? Can the claimant take action to "vest" the use and make an end run around the amendment to Measure 37 proposed by House Bill 3540?

In Oregon, the law on nonconforming uses and vesting provides that a landowner *may not* take steps to "vest" when the owner has notice that the land use laws may change. 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* at 198. Pursuant to *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.

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[1] *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").

[2] *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 is shown to cause "no greater adverse impact to the neighborhood").

[3] *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").

On the other hand, a person who has a house built as of June 15, 2007 has probably secured a vested right to a non-conforming use.[4] A property owner who is in the process of trying to proceed under Measure 37 can survive the new law only if the use is "*vested*" before the new law is enacted. However, now that new legislation is *pending*, the *common law* on vesting means that a person is not able to vest those rights in good faith.

Other jurisdictions have faced this legal question squarely.[5] The case law provides that the attempt to outrace the effective date of pending land use legislation by commencing construction prior to the legislation's pending adoption is considered "bad faith" and is fatal to the claim. In an instructive case on point, the court held that a corporation who 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 S.E.2d 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.

In sum, under the common law, property owners with unvested Measure 37 claims *may not* circumvent the impending legislative fix to ORS 197.352 by moving to establish a use that will be impermissible under the proposed new law.[6] Even if a use meets all of the common law "vesting" requirements and becomes a fully established "non-conforming use," that use may be subject to a number of limitations as described above. The potential for future litigation makes ownership of a fully vested nonconforming use a burdensome and perhaps risky proposition.

Local jurisdictions and state agencies have been charged with following the common law. The legislature wanted the voters to be able to decide this fall on statutory language that will clarify Measure 37 and provide more certainty for all Oregonians. The legislature specifically referenced the common law on vesting as the source of the limitations on vesting. In so doing, the legislature has provided a referral that will allow Oregonians to cast a valid and meaningful vote on the matter.

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[4] In *Holmes*, a person who has made substantial expenditures and met other prerequisites can vest rights to a nonconforming use. Bad faith bars vesting, however, rendering the amount of expenditures a person makes after June 15, 2007 irrelevant.

[5] *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 S.W.2d 491, cert den 344 U.S. 913, 97 L. Ed. 704, 73 S. Ct. 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 A.2d 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).

[6] *R.A. Vachon & Son, Inc. v. City of Concord*, 289 A.2d 646 (NH 1972) (landowners with constructive notice of a proposed zoning ordinance pre\vented from vesting before the proposed regulations went into effect.)