To: County Commissioners, Planning Commissioners, County Counsel and All Interested Parties

From: James D. Zupancic, J.D., CRE and Kristina N. Faricy, J.D.

RE: Common Law Vested Rights under Measure 49

Date: December 7, 2007

SUMMARY[1]

Now that much of the emotion and vitriol surrounding the Measure 49 debate has subsided, and Measure 49 is now the law, local governments are faced with the practical challenge of implementing the new standards and procedures.

Understanding the issue of "vested rights" is, at least initially, central to that implementation. The purpose of this memo is to provide a balanced and unbiased scholarly analysis of vested rights under Measure 49, recognizing both the interests of government and the rights of the landowner. With all of the "opinions" abounding concerning what does or does not constitute vested rights, we are left with one conclusion: it is not one law or consulting firm, one special interest group, the DLCD, the Attorney General or any other agency that will decide this issue. Ultimately, the decision rests with the judiciary. Until the Oregon Court of Appeals and/or the Oregon Supreme Court decides, we are left to our best understanding of what constitutes "vested rights" under Measure 49.

We believe it is fair to conclude that, at present, there is no bright-line test in Oregon to determine when Measure 37 rights may be "vested" so as to avoid application of Measure 49. Those who purport to articulate a black-and-white standard, or claim that some Measure 37 claimants are definitely vested or not, often reveal their own ideological slant in the process. While there is a role for advocacy, the determination of vested rights entails an intricate balancing of such important interests that statesmanship and thoughtful jurisprudence should prevail. It is in this hope that we share this analysis so that others may continue the discussion and make decisions based upon law and facts rather than innuendo or bias.

Based on an extensive review of the case law and literature on this issue, we believe the following:

1. While the *Holmes* case, decided in 1973, established the criteria for evaluating vested rights, the relative importance of each criterion and the proper application according to the facts of each Measure 37 case will differ. Each vested rights case must be evaluated on its own unique facts, and within a regulatory and economic environment that is much different than it was when the *Holmes* decision was handed down nearly 35 years ago.

[1] No legal advice is expressed or implied. It is recommended that all seek advice of experienced legal counsel regarding these issues.

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2. The *Fountain Village* case, decided in 2001 and citing to *Holmes*, teaches that local governments retain the right to decide when vested rights may be established and lost, noting that local government decisions are subject to judicial review.

3. The *Corey* case, currently on appeal to the Oregon Supreme Court, may be pivotal in establishing whether a Measure 37 claimant has a constitutionally protected property interest in their waivers, and therefore, whether they have a vested right subject to Due Process protection. The Oregon Court of Appeals decided earlier this year that Measure 37 claimants with "waivers" do possess constitutionally protected property interests in those waivers.

4. Legal scholars have cited ORS §§ 215.427(3)(a) and 227.178(3)(a) to conclude that Oregon has a "new form of vested rights" such that, an applicant for a land use approval may rely upon the law as it existed at the time of their land use application. This position has been ratified by Oregon common law and creates yet another avenue to determine vested rights.

Therefore, until the final appeal is decided, no one should opine with any certainty which legal argument will prevail. Nevertheless, this should not deter local governments from taking action on Measure 37 land use applications or allowing development if they conclude that vested rights apply. We trust that the following analysis will provide valuable insight into the question of what constitutes a common law vested right in Oregon.

ANALYSIS

I. Why are "Vested Rights" Important to Measure 37 Claimants?

A. The Measure 49 "Vested Rights" Exception

Before commencing the "vested rights" analysis under Measure 49, it is critical to understand why the meaning of "vested rights" will play a pivotal role as existing Measure 37 claimants begin to navigate through the uncharted waters Measure 49. Simply put, the determination of whether a Measure 37 claimant has a vested right to continue development, will single handedly determine how or if a claimant must proceed under Measure 49.

Section 5(3) of Measure 49 states that Measure 37 claimants who filed their claims before June 28, 2007 are entitled to "just compensation" under Measure 49 "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 [Measure 49] effective date[2] . . . to complete and continue the use described in the waiver.[3]

The definition of "common law vested right" was not included in the text of Measure 49. However, "common law" is defined as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions."[4] This means, that under Measure 49, the definition of "vested rights" is to be derived from judicial decisions. Federal courts, including the U.S. Supreme Court, have

[2] Measure 49 became effective on December 6, 2007.
[3] Emphasis added.
[4] *Black's Law Dictionary* (Bryan A. Garner ed., West Group , 7th ed. 1999).

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determined that state courts should establish the means by which property rights may become "vested".[5]

B. Vested Rights, Non-Conforming Uses and Takings

Vested Rights Defined

The vested rights doctrine has been created by courts and, more recently, state legislatures to assist in determining the point at which a landowner or land developer has sufficiently changed position in reliance upon government approval of their development plans, so that it is unfair[6] to allow the government to enforce new land use legislation against them.[7]

Because, originally, the vested rights doctrine was a creation of the Oregon courts, it is not "literally" addressed in the Oregon Revised Statutes,[8] and is rarely mentioned in Oregon county ordinances or city codes.[9]

Furthermore, because the doctrine of vested rights derives from the property protections enumerated in the Fifth and Fourteenth Amendments of the U.S. Constitution and similar provisions in state constitutions, when one acquires vested rights protection, the investment in developing land is preserved as originally conceived because the new land use laws cannot be enforced against a "vested development".[10] Additionally, because rights that are not considered "property" are not protected and may be taken by the government without just compensation, development rights must vest to achieve "property" status and become protected.[11] Once this occurs, vested development rights become immune from exercises of governmental police power, though they may still be taken by eminent domain, but not without payment of just compensation to the land owner.[12]

Essentially, the doctrine of vested rights restrains any government action which treats a "vested development" as an illegal use of land,[13] providing a right to proceed that cannot be taken away without due process.[14]

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[5] *See generally Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Get Outdoors II, LLC v. City of Lemon Grove*, 378 F. Supp. 2d 1232 (S.D. Cal. 2005); and *Outdoor Media Group, Inc. v. City of Beaumont*, 374 F. Supp. 2d 881 (C.D. Cal. 2005), noting that the meaning of the word "property" in the Fifth Amendment of the Federal Constitution is a federal questions, it usually obtains its content by reference to local law.
[6] The rationale behind the doctrine of vested rights is the legal principle of equitable estoppel, such that, at some point in the development process, the government should be stopped from changing zoning regulations that prohibit the completion of a development project or diminish the return on the developer's investment. *See* Brad K. Schwarts, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. Envtl. L. Rev. 719 (2001).
[7] Karen L. Crocker, Note, *Vested Rights and Zoning Avoiding All-Or-Nothing Results*, 43 B.C. L. Rev. 935, 935-936 (2002).
[8] *But see* ORS §§ 215.427(3)(a) and 227.178(3)(a) and the discussion *infra* page 9.
[9] Michael E. Judd, *Land Use* § 12.3 (Oregon CLE 1994 & Supp. 2000).
[10] Karen L. Crocker, *supra,* at 936 n.7.
[11] Grayson P. Hanes and J. Randall Michew, *On Vested Rights to Land Use and Development*, 46 Wash. & Lee L. Rev. 373, 386 (1989). *See* U.S. Cost., amends. V, XIV § 2. The "takings" clause of the Fifth Amendment was determined to be applicable to the states through the "due process" clause of the Fourteenth Amendment in the very early part of the twentieth century. *See Chicago, Burlington & Quincy Ry. V. Illinois ex rel. Drainage Comm'rs*, 200 US 561, 593 (1906).
[12] Grayson P. Hanes and J. Randall Michew, *supra,* at 386 n. 11.
[13] Layne J. McWilliams and Eugene L. Grant, *Potential Impace of Ballot Measure 49 on Existing Measure 37 Claimants*, Real Estate & Land Use Advisory Bulletin, http://www.dwt.com/practc/realprop/bulletins/08-07_Measure49(print).html (2007).

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Vested Rights as Non-Conforming Uses

Any discussion of vested property rights must also include a discussion of non-conforming uses. Both are based on principals of law and equity, and both allow a developer or landowner to continue developing or using their land even following a change in land use regulations that would otherwise prohibit or limit that development or activity.[15]

Generally, non-conforming uses protect uses that *already exist* when changes are made to zoning legislation; and vested rights pertain to uses that are *not yet established* because development hasn't been completed.[16] However, Oregon courts have blurred the line between the two, and have held that vested rights are, in effect, inchoate non-conforming uses.[17] Given this blurring, if a vested right is, in fact, considered a non-conforming use, once a developer or land owner has acquired vested right status, the rules governing the process by which one can maintain their non-conforming use status becomes paramount because continued lawful status is subject to a variety of restrictions.[18]

However, before achieving "non-conforming use status", an existing Measure 37 claimant must determine whether or not they have vested rights such that they are protected from Measure 49 implications. This determination will likely be based upon the location of the Measure 37 claimant along the "vested rights development timeline", as illustrated below. However, before continuing further, the issue of the potential protected property interest created in a Measure 37 waiver must first be discussed.

II. Are Measure 37 Waivers a Protected Property Interest? If So, To What Extent Are They Protected?

When a Measure 37 Claimant has received a waiver from *both* the State and the local government in which the subject property is located, the question becomes: Is the waiver a protected property interest?

Corey v. DLCD

In early 2007, the Oregon Court of Appeals held that, when the Department of Land Conservation and Development (DLCD) issues a favorable "final order" to Measure 37 claimants, it establishes "an entitlement to benefits . . . [that creates] a protected property interest in the waivers".[19] Thus, at a minimum, a claimant has a "constitutionally protected property interest in receiving all of the benefit for which he or she qualifies . . . [and] has the right to a [full contested case] hearing

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[14] Brad K. Schwarts, *supra*, n. 6.
[15] David L. Callies, Daniel J. Curtin, Jr., & Julie A. Tappendorf, *Bargaining for Development: A Handbook on Development Agreements, Annexation Agreements, Land Development Conditions, Vested Rights and the Provision of Public Facilities*128 (Environmental Law Institute 2003).
[16] *Id.* (Environmental Law Institute 2003) (emphasis added).
[17] *Fountain Village Development Co. v. Multnomah County*, 176 Or. App. 213, 221, 31 P.3d 458 (2001).
[18] *See generally* ORS 215.130 (2005) including restrictions on alterations and forfeiture.
[19] *Corey v. DLCD*, 210 Or. App. 542, 551 152 P.3d 933 (2007), *on reconsideration Corey v. Department of Land Conservation and Development*, 212 Or.App. 536, 159 P.3d 327 (Or.App. May 09, 2007), *review allowed by Corey v. Department of Land Conservation and Development*, 343 Or. 363, --- P.3d ---- (Or. Oct 18, 2007).

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regarding the extent of the benefit" before that benefit can be altered or withdrawn.[20] The Court analogized the receipt of a favorable final order from the State to the receipt of worker's compensation benefits holding that the recipient of such a benefit holds a protected property interest in that benefit.[21] Although this interest is not a "vested right" per se, it is the similitude of and is protected in a like manner as a vested right. A waiver, as a protected property interest, likely cannot be altered or amended without procedural due process and the potential payment of just compensation. So, the requirement in Measure 49 that Measure 37 claimants with favorable final orders reapply under Measure 49, may be a violation of the procedural due process rights of those Measure 37 claimants.

Ultimately, the questions under *Corey* therefore become whether or not 1) the Measure 49 application process requiring all Measure 37 claimants, including those with favorable final orders, to reapply for receipt of the same benefit or a more restricted benefit (i.e. the number of parcels they are allowed to create on their land), provides sufficient procedural due process to those claimants, and if so, 2) are they entitled to just compensation for the diminution in value, resulting from the more restrictive permit? The *Corey* decision is currently on appeal to the Oregon Supreme Court. If the Court holds that a waiver is not a protected property interest, then the analysis above is likely moot.

However, if upheld, the entire Measure 49 "common law vested rights" analysis may not matter. If Measure 37 claimants are found to have a protected property interest in their waiver, then that interest is already vested to the extent that before it can be altered or extinguished, the State of Oregon will owe each claimant holding a favorable final order, procedural due process to determine the extent of the value lost in the altered waiver and the just compensation due for that loss.[22]

Additionally, the U.S. Supreme Court has held that justification that is sufficient to validate a statute's prospective application under the Due Process Clause, may not be enough to warrant its *retroactive application* because "the Due Process Clause protects interests in fair notice and repose that may be compromised by retroactive legislation."[23] Of course one could argue that, to the extent that Measure 49 requires Measure 37 claimants to reapply under Measure 49, Measure 49 is retroactive in nature. The U.S. Supreme Court recognized that "*every statute, which* takes away or impairs vested rights acquired under existing laws, or *creates a new obligation, imposes a new duty*, or attaches a new disability, *in respect to transactions or considerations already past, must be deemed retrospective...*"[24] and concluded that, although "the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope . . . statutory retroactivity has long been disfavored."[25] One could certainly argue that, in requiring Measure 37 claimants to reapply under Measure 49 if they wish move forward, certainly *creates a new obligation and imposes a new duty in respect to transactions and considerations already past,* at least insofar as Measure 37 claimants with

[20] *Emmel v. DLCD*, 213 Or. App. 681(2007) citing *Id.* at 551.
[21] *Id.*
[22] The Fifth Amendment's Taking Clause, as incorporated into Oregon's Constitution by the 14th Amendment, prevents the government from depriving private persons of vested property rights, except for public use and upon payment of just compensation. U.S.C.A. Const. Amends. 5 and 14.
[23] *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) citing *Usery v. Turner Elkhorn Minimg Co.*, 428 U.S. 1, 17 (1976). In *Landgraf* the Court noted that:

> "retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution." *Id.* at 266.

[24] *Id.* at 269 quoting *Society for Propagation of the Gospel v. Wheeler,* 22 F.Cas. 756 (No. 13, 156) (CCNH 1814) as it pertained to *both* criminal and civil legislation (emphasis added).
[25] *Landgraf, supra*, at 267-268 n. 23.

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favorable final orders are concerned. As such, if Measure 49 is considered retroactive by Oregon courts, then perhaps it should not be applied to existing Measure 37 claimants with favorable final orders in the interest of Due Process.

III. What is a "Common Law Vested Right" Under Measure 49?

Vested rights are granted by states and localities in an effort to balance a land developer's need for certainty with the local governments' need for legal flexibility.[26] So, each state has developed its own standard for the point at which it will grant vested rights status for a particular development.[27]

In Oregon, the seminal vested rights case is *Clackamas Co. v. Holmes.*[28] In *Holmes*, the Oregon Supreme Court specified a variety of factors that should be analyzed, on a case-by-case basis, when making the decision of who has vested rights.[29] These factors include:

1. The ratio of the expenses currently incurred by the developer to the to the total cost of the completed project;[30]

2. The type of expenditures; specifically, whether the expenditures have a relationship to the completed project, or whether those expenditures could apply to other uses of the land, the kind of the project or the location and ultimate cost;

3. The acts of the land owner and whether or not they rise beyond mere contemplated use or preparation;[31] and

4. The good faith of the landowner or developer with regard to whether or not he/ she has notice of any proposed zoning or amendatory zoning before beginning any land improvements.[32]

In concluding its list of factors, the Court noted that not all of the factors have to be addressed and analyzed in every case.[33] The Court of Appeals expanded on this notion by holding that in deciding whether a vested right exists, a city or county does not have to separately consider each, and may actually apply different weight to each of the factors, depending on the individual circumstances of each case.[34]

However, since *Holmes* was decided, most of the appellate decisions have primarily focused on the ratio of the expenditures made prior to the implementation of the more restrictive zoning to the total cost of the development project.[35] When calculating the value of expenditures, courts have not

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[26] Karen L. Crocker, *supra,* at 937 n. 7.
[27] *Id.*
[28] 265 Or. 193, 508 P.2d 190 (1973).
[29] *Clackamas Co. v. Holmes,* 265 Or. 193, 508 P.2d 190 (1973).
[30] In this case, the Court held that the Holmes' good-faith expenditure of $33,000 or 1/14th of the total development costs, gave them a vested right to complete their development. *See Clackamas Co., supra,* n. 29.
[31] For example, the acts go beyond such things as leveling the land, boring test holes, or preliminary negotiations with contractors or architects. *See Clackamas Co., supra,* at 198-199 n. 29.
[32] *Id.*.
[33] *Id.* .
[34] *Union Oil Co. v. Board of Co. Comm. Of Clack. Co.,* 81 Or. App. 1, 724 P.2d 341 (1986).
[35] Michael E. Judd, *supra,* at § 12.21 n. 9.

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included the purchase price of the land, without a showing that a premium was only paid because of the specific use planned.[36] Additionally, nominal preliminary expenditures may not be sufficient to vest a development right when significant additional approvals are necessary to approve the development.[37] Finally, expenditures that are consistent with other property uses are also not taken into account.[38]

For example, the Court of Appeals has held that a developer has a vested right to develop a partially built subdivision because of his pre-zoning installation of a $58,000 water supply system that served the entire subdivision.[39] Conversely, the installation of a $110,000 water system was not sufficient to vest the developer's rights when, in addition to serving the intended half-acre lots, that water system could also serve the residences on the allowed 5 acre-lots, and the remainder of the water could be resold.[40] Furthermore, in another case, it was held that a person has a right to continue the development of a mobile home park when expenditures are made in a manner that is more consistent with mobile home park construction than any other possible uses.[41] Ultimately, to be included as an expenditure under the ratio test, costs must have been made to further a use that is allowed under the applicable land use law.[42] Additionally, although no exact ratio requirement exists, case law provides us with some guidelines: the ratio of 1:14 has been held sufficient,[43] and LUBA has found ratios of 1:47 and 1:50 to be insufficient.[44]

Given that the determination of who has a vested right and who does not must occur on a case-by-case basis, disparate results are likely. In fact, due to the incongruous results of what constitutes common law vesting under *Holmes* and similar vesting rules across the U.S., legal scholars have criticized the rules for granting vested rights protection in an untimely and uncertain manner. Similar tests to the one provided in *Holmes* have been called "arbitrary," "inefficient,"[45] and the "handmaiden of . . . administrative anarchy."[46]

Furthermore, it is rationally argued that the types of vesting rules handed down in similar cases to *Holmes* are outdated because they were often established in connection with single building projects on single parcels, requiring only one permit—the building permit.[47] In that context, the rule does provide some measure of certainty and objectivity as to when development rights vests.[48] However, in

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[36] *Union Oil Co., supra,* n. 34; *DLCD v. Curry County*, 19 Or. LUBA 237 (1990).
[37] *Mason v. Mountain River Estates*, 73 Or. App. 334, 698 P.2d 529 (1985).
[38] Michael E. Judd, *supra,* at § 12.21 n. 9.
[39] *Eklund v. Clackamas County*, 36 Or. App. 73, 583 P.2d 567 (1978).
[40] *Webber v. Clackamas County*, 42 Or. App. 151, 600 P.2d 448 (1979).
[41] *See Cook v. Clackamas County*, 50 Or. App. 75, 84, 622 P.2d 1107 (1981); *Cook, supra,* at 84 n. 4, and *Webber, supra,* n. 40 no figure for total development costs was provided, but when it denied the claim, the Court estimated that the ratio was "far less favorable" than 1:14.
[42] Michael E. Judd, *supra,* at § 12.21 n. 9. In *Lung v. Marion County*, 21 Or. LUBA 302 (1991), LUBA held that a vested right to a landscaping business had not been established on the basis of outlays for its development, because there had been no conditional use approval for it, as required at that time. Additionally, expenses incurred to divide a parcel into two lots could not be considered when the owner had not applied for the required partition approval. *Crone v. Clackamas County*, 21 Or. LUBA 102 (1991).
[43] *Clackamas Co., supra,* n. 29.
[44] *Union Oil Co. v. Board of Co. Comm. Of Clack. Co.,* 14 Or. LUBA 719 (1986); *DLCD, supra,* at 249 n. 36.
[45] *See* Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L.J. 625, 710 (1978).
[46] *Aley v. Cal. Tahoe Reg'l Plannning Agency*, 137 Cal. Rptr. 699, 711 (1977).
[47] Karen L. Crocker, *supra,* at 955 n. 7.
[48] *Id.*

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modern land development, the issuance of a building permit often occurs very late in the planning process whereby developers are required to secure several local government approvals before receiving a building permit; a process which requires substantial expenditures on surveys, geotechnical reports, environmental studies, civil engineering designs, architectural drawings, and other planning tools.[49] Additionally, with Measures 37 and 49 thrown into the mix, the development process often costs claimants tens of thousands of dollars more than it would to proceed under more traditional circumstances. If, during this process, the government makes a significant change in the law, as it has under Measure 49, claimants stand to lose considerable sums of money.

Furthermore, the *Holmes* decision was handed down under a completely different set of circumstances. In that case, what constituted "vested rights" was only analyzed from the *land use application* process forward.[50] The Court did not have the opportunity to determine the issue of what constitutes a "vested right" when, prior to submitting a land use application, the individual is directed by the State to submit two applications (1 to the State, and 1 to the local government in which the property is located) for a determination of whether or not the claimant is even permitted to submit a land use application. Obtaining a favorable decision and waiver under these circumstances, frequently costs claimants very large sums of money, who only invested in the process because the law stated that, if they were successful in doing so, they would be permitted to build on their land under the conditions set forth in their individual waivers. This circumstance is wholly different from the facts under *Holmes*.

Given this reasoning, no commentator can be sure that courts will apply *Holmes* literally and strictly, and is why the *Corey* decision is so important. If *Corey* is upheld by the Oregon Supreme Court, the answer is clear that the vested rights determination of today *is* different as it pertains to Measure 37 claimants because a vested right is a protected property interest.[51] If, under *Corey*, the waivers remain protected property interests, then they are also vested rights.

IV. Can a Claimant Obtain a Vested Right Under ORS §§ 215.427(3)(a) or 227.178(3)(a)?

According to Michael E. Judd, assistant county counsel for Clackamas County, Oregon City: "[i]t must be noted that the rules of the vested rights game have been changed somewhat by the enactment of ORS [215.427(3) and 227.178(3)].[52] These statutes provide that 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."[53] *An applicant now has a form of vested right to a particular use solely*

[49] *Id.* at 955-956.
[50] *See generally Clackamas Co., supra*, n. 29.
[51] Karen L. Crocker, *supra*, at 936 n. 7 espousing on the idea that the doctrine of vested rights derives from the property protections enumerated in the Fifth and Fourteenth Amendments of the U.S. Constitution and similar provisions in state constitutions. When one acquires vested rights protection, their investment in developing their land is preserved as originally conceived because the new zoning laws cannot be enforced against a "vested development". Additionally, vested development rights are immune from exercises of governmental police power, though they may still be taken by eminent domain, but not without payment of just compensation to the land owner.
[52] Michael E. Judd, *supra*, at § 12.22 n.9.
[53] Quoting ORS §§ 215.427(3)(a) (2005) and 227.178(3)(a) (2005) which was added to the Oregon Revised Statutes in 1983 through House Bill 2295; 10 years after *Holmes* was decided.

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because an application for it has been made (assuming, of course, the standards in effect at the time of the application can be met)."[54]

Thus, under these two statutes, commonly known as the "Goal Post Rule", the Oregon Court of Appeals has held that "persons who file [land use] applications before more restrictive legislation is adopted ***are entitled*** to have the earlier law applied to their applications. Otherwise, their rights under the pre-existing standards would be permanently nullified."[55] Therefore, both cities and counties in Oregon are required to evaluate land use applications based upon the zoning ordinances that were in place at the time the claimant submitted their initial land use application, instead of the law that existed when the application became "complete."[56]

In the context of Measures 37 and 49, one could posit that, under the above referenced statutes, if a claimant submitted a land use application (after receiving their final order) to their respective city or county before the effective date of Measure 49 (December 6, 2007), then the approval or denial of their land use application must be based upon the standards and criteria found in their final orders given that those standards and criteria were the ones applicable at the time the application was first submitted.[57]

Additionally, although one may argue that ORS §§ 215.427(3)(a) and 227.178(3)(a) don't apply to changes in land use laws at the *state* level, since Measure 37 claimants were required to obtain approval at both the state and local level, any claimant who submits a land use application is submitting it based upon the standards and criteria listed in the final orders issue by the locality. This is especially true when one considers that the Oregon Court of Appeals has held that:

> "'standards and criteria' . . . is not limited to the provisions that may be characterized as 'approval criteria' in a local comprehensive plan or land use regulation. *The role that the terms play in the two statutes is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings.*[58]
> "The statutes do not refer only to the local provisions that the local government *must* apply in acting on an application; it also includes provisions . . . that the government *does* apply and that have a meaningful impact on its decisions."[59]

Ultimately though, since Measure 49 does not prohibit the application of either statute to Measure 37 claimants, the Oregon courts will likely be called upon to determine if the statutes provide any protection to claimants who have already submitted land use applications under the authority of

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[54] Michael E. Judd, *supra*, at § 12.22 n. 9 (emphasis added). *See also Kirpal Light Satsang v. Douglas County*, 96 Or. App. 207, 772 P.2d 944, *on reconsideration*, 97 Or. App. 614, *rev. denied*, 308 Or. 382 (1989); 83 Am. Jur. 2d Zoning and Planning § 574 stating that in Oregon, vesting occurs at time of application by statute under *Kirpal, supra*, n. 54.
[55] *Sunburst II Homeowners Assoc. v. City of West Linn*, 101 Or. App. 458, 461, 790 P.2d 1213 (1990) (emphasis added).
[56] *Kirpal, supra*, at 212 n. 54.
[57] Quoting ORS §§ 215.427(3)(a) and 227.178(3)(a) *supra*, n. 53.
[58] *Davenport v. City of Tigard*, 121 Or. App. 135, 141, 854 P.2d 483 (1993) (emphasis added).
[59] *Id.*(original emphasis).

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their "final" waivers. But, what would be the purpose of the statutes if not to create certainty for developers?[60]

Furthermore, although Measure 49 states that claimants who filed their claim before June 28, 2007 are entitled to "just compensation" under Measure 49 "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 [Measure 49] effective date[61] . . . to complete and continue the use described in the waiver,[62] one could deduce that, because Oregon case law interprets ORS §§ 215.427(3)(a) and 227.178(3)(a) as, arguably, creating some form of a vested right,[63] it may therefore be argued that the statues have, in fact, become a part of the common law as far as vested rights are concerned in Oregon. Because ORS §§ 215.427(3)(a) and 227.178(3)(a) were enacted 10 years after *Holmes* was originally decided, and no decision has examined the two approaches together, it is unclear whether Oregon courts would hold that the statutes create a vested right similar to the vested right the *Holmes* test creates. However, a look outside of Oregon, to states with similar legislation, sheds some light on the issue.

The rule stated in ORS §§ 215.427(3)(a) and 227.178(3)(a) is known to legal land use scholars as the "early vesting rule", and in jurisdictions with similar statutes, such as Colorado, Massachusetts, Texas and Washington, a developer acquires vested rights as of the date of a site-specific land use application.[64]

Like ORS §§ 215.427(3)(a) and 227.178(3)(a), other states have decided that approval or denial of a land use application should also be based upon the standards and criteria that were applicable at the time the application was first submitted. Washington state departed from the majority vesting rule over fifty years ago, first by common law in 1954, then by statute in 1987[65] when the Washington Supreme Court held that, at the time a landowner files a land use application, he acquires a vested right to use his land in accordance with the then existing land use law.[66] The Washington Supreme Court wrote:

> "Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit. We prefer not to adopt a rule which forces the court to search through . . . the 'moves and countermoves of . . . parties' . . . to find that date upon which the substantial change of position is made which finally vests the right."[67]

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[60] Research into the legislative history of House Bill 2295 did not shed light on the issue of vesting under the statutes. However, in *Davenport v. City of Tigard* the Court of Appeals affirmed that the purpose of the statutes was to "assure proponents and opponents of an application that the substantive factors . . . will remain constant." *Id.*
[61] Measure 49 was effective on December 6, 2007.
[62] *Emphasis added.*
[63] Michael E. Judd, *supra,* at § 12.22 n. 9.
[64] Karen L. Crocker, *supra,* at 950 n. 7.
[65] The Revised Code of Washington § 58.17.033 reads: "[a] proposed division of land . . . shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land ***at the time a fully completed*** application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city or town official." RCW § 58.17.033 (2007). Additionally, the RCW § 19.27.095 states that "[a] valid and fully complete building permit application for a structure, tha is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application." RCW §19.27.095 (2007).
[66] *State ex rel. Ogden v. City of Bellevue*, 275 P.2d 899 (Wash. 1954).
[67] *Hull v. Hunt*, 331 P.2d 856, 859 (Wash. 1958).

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And the Washington State Legislature then enacted RCW § 58.17.033 which currently reads:

> "[a] proposed division of land . . . shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land ***at the time a fully completed*** application . . . has been submitted to the appropriate county, city or town official."[68]

And RCW § 19.27.095 states that:

> "[a] valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances **in effect on** the date of the application shall be considered under the building permit ordinance in effect **at the time of** application, and the zoning or other land use control ordinances **in effect on** the date of application."[69]

So, although it is unclear whether or not the Oregon courts would apply these statutes in the same fashion as other states under the "early vesting rule",[70] one thing is clear – the Oregon courts do look to ORS §§ 215.427(3)(a) and 227.178(3)(a) as a means by which legal certainty is created for land developers in a world of ever changing rules and regulations - "[o]therwise, their rights under the pre-existing standards would be permanently nullified."[71]

V. What About Local Vesting Rules?

As provided in *Fountain Village Development Co. v. Multnomah County* in 2001, under the Oregon Revised Statutes, cities and counties are

> "responsible for adopting comprehensive plans, as well as zoning, subdivision, and other ordinances applicable to all land within the [city or] county. 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."[72]

The Court of Appeals goes on to note that local governments are also allowed to "address and regulate the conditions under which vested rights may be extinguished."[73] If this is true, one may also deduce that, if a locality is permitted to determine when a vested right *ends*, so too must they be allowed to determine when a vested right is *created* or *begins*. If this is true, one must then question the viability of the *Holmes* test in light of the holding in *Fountain Village*. If a locality is free to determine when a right vests and when it is extinguished under their power to regulate nonconforming uses, does *Holmes* still control the common law vested rights debate? The answer is unclear, and has yet to be analyzed by the courts.

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[68] RCW § 58.17.033 (2007) (emphasis added).
[69] RCW §19.27.095 (2007) (emphasis added).
[70] Karen L. Crocker, *supra,*,at 950 n. 7.
[71] *Sunburst II Homeowners Assoc., supra,* at 461 n. 55 (emphasis added).
[72] *Fountain Village Development Co., supra,* at 221-222 n. 17.
[73] *Id.* at 213.

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Regardless, given the holding in *Fountain Village*, local development codes should certainly be referenced to determine whether or not a rule has been promulgated that governs the point in time at which a developer is vested.[74]

VI. Conclusion

Clearly, despite the array of vested rights approaches potentially available in Oregon, none will please all of the parties concerned. However, given the, perhaps unexpected lack of clarity in Oregon's vested rights law and the application of it to Measure 49, the initial concern of the courts will likely be which law governs?

No one disagrees that *Holmes* provides a test for vesting. However, under ORS §§ 215.427(3)(a) and 227.178(3)(a), Oregon also seemingly falls under the "early vesting rule" by vesting development rights at the time the developer submits his/ her land use application. And, although the statutes do not specifically state that they are governing "vested rights", *Fountain Village* held that just because a statute does not explicitly use the term "vested rights" does not mean that localities are not permitted to address the issue.[75] Additionally, if the statutes create, in fact, a form of vesting, as noted by the assistant county counsel for Clackamas County,[76] both have been examined and applied under Oregon's common law, and may arguably also need to be included in any Measure 49 vested rights decision. Furthermore, under *Fountain Village* it remains unclear as to whether the initial decision of who has vested rights, should be made at the local level according to the locality's own standards.

Given this uncertainty, it is difficult to say which law will ultimately control. Additionally, with respect to the application of Measure 49 and ORS §§ 215.427(3)(a) and 227.178(3)(a), it is also unclear which statute should govern given that they conflict with one another -- especially when neither statute specifies its application to the other. One may also argue that, under Measure 49, Section 5(3), the answer is clear: to be exempt under Measure 49, a Measure 37 claimant must have a common law vested right in order to continue their development under Measure 37, implying that

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[74] Layne J. McWilliams and Eugene L. Grant, *supra*, n. 13. Each county's vested right ordinance, if, of course it even has one, will be specific to that county and may vary from other Oregon counties. For example, § 13.030 of the Wasco County Land Use and Development Ordinance holds that "nothing contained in this Ordinance shall require any change in the plans, construction, alteration, or designated use of a structure for which a building permit has been issued and construction work has commenced prior to the adoption of this Ordinance, provided the building, if nonconforming or intended for a conforming use, is completed and in use within one (1) year from the time the building permit is issued."

Compare Wasco County's vested rights statute to Washington County's statute which, under Chapter 214 of its Land and Development Ordinance holds that "[t]hrough a Type III procedure, in the course of any County land use process, the Review Authority may decide whether a vested right exists. Whether a vested right is found to exist shall be based on the consideration of the following factors as well as any guidance from the local Oregon Courts: A) The ratio of expenditures incurred to the total cost of the project; B) The good faith of the landowner; C) Whether or not the landowner had notice of any proposed zoning or amendatory zoning before starting the improvements; D) Whether the expenditures have any relation to the completed project or could apply to various other uses of the land; E)The kind of project, the location, and ultimate cost; and F) Whether the acts of the landowner rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects."

In the above examples, it is clear that Washington County opted to apply the *Holmes* vested rights doctrine to their land use ordinances, while Wasco County opted not to, and instead chose to create a specific point in time in which a person is vested -- the point at which they receive their building permit and construction commences.

[75] *Fountain Village Development Co., supra,* at 221-222 n. 17 discussing the fact that although "O.R.S. 215.130 does not explicitly use the term "vested rights" does not mean that local governments responsible for ordinances controlling land use are powerless to address and regulate the conditions under which vested rights may be extinguished."

[76] Michael E. Judd, *supra,* at § 12.22 n. 9.

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Holmes (and/ or *Fountain Village*) controls, and that ORS §§ 215.427(3)(a) and 227.178(3)(a) are inapplicable.

However, as previously discussed, many cases in Oregon have, in fact, analyzed the meaning and application of ORS §§ 215.427(3)(a) and 227.178(3)(a), thereby bringing the application of the statutes into the common law. And, although none of these cases directly labeled the statutes "vesting statutes", the implication and enforcement of the statutes creates a form of vested right in, at a minimum, the "standards and criteria" that existed at the time the land use application is submitted.[77]

Additionally, the local governments seeking to properly apply Measure 49 may be further pressured by the uncertainty in Oregon's laws surrounding vested rights and the true implication of ORS §§ 215.427(3)(a) and 227.178(3)(a), because under ORS 197.835(10)(a), LUBA is required to order a local government to grant approval of a denied land use application if it finds that the local government's action was for the purpose of avoiding the requirements of ORS §§ 215.427 or 227.178.[78] One may therefore posit that complying with *Holmes* directly conflicts with the application of ORS §§ 215.427(3)(a) and 227.178(3)(a) because to apply *Holmes* instead of the statutes most certainly avoids the statutory requirements of ORS §§ 215.427(3)(a) and 227.178(3)(a). Given this argument, LUBA, as it pertains to review of a denied land use application, must grant approval of any denied Measure 37 land use application if the purpose of the denial under Measure 49 was to avoid the requirements of ORS §§ 215.427 or 227.178.

Ultimately, all of these uncertainties will have to be untangled in the courts. However, one thing is clear, the definition of "common law vested rights" is not as cut and dry as some would lead the public to believe.

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[77] *Id.*

[78] *See West Coast Media, LLC v. City of Gladstone*, 192 Or.App.102, 112-113, 84 P.3d 231 (2004) in which the court held that this is the only time in which LUBA is required to order a local government to grant approval of a land use application.

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