

1000 Friends of Oregon's Guide to *Measure 37 Vested Rights*

This guide will be modified as the State of Oregon provides direction on the implementation of Measure 49.

What is This Guide About?

This guide is designed to describe what a “vested right” to develop under Measure 37 is in light of the passage of Measure 49. It includes practical steps to take to evaluate whether a Measure 37 claim near you is being developed under a “vested right” theory and, if so, how to evaluate whether it qualifies.

What is a “vested right”? In general, it is the right to complete a development that is already underway when regulations change in a way that would otherwise prohibit the development. Development rights can only “vest” if certain factors are met. While some Measure 37 claimants may have legitimately vested their Measure 47 development rights, the majority has not.

Many of the issues discussed below are complex. If you have questions regarding a specific development near you we recommend you consult an attorney.

What Does “Vested Rights” Have to do with Measure 49?

On November 6, 2007, Oregon voters passed Measure 49, which goes into effect on December 6, 2007. Measure 49 amends ORS 197.352, which is commonly referred to as Measure 37. For those who filed Measure 37 claims prior to June 15, 2007, Measure 49 allows development of up to 3 houses or, in some cases, up to 10 houses per claim (20 homes total per claimant). Measure 49 does not allow commercial or industrial development based on Measure 37 claims. Most Measure 37 claimants will choose to develop under Measure 49 rules.

However, some Measure 37 claimants will prefer to develop under the original Measure 37, so they can build more houses than would be allowed under Measure 49 or develop commercial or industrial uses. For these larger developments, Measure 49 allows only claimants who have “vested” their Measure 37 claims to complete construction and use the development after it is completed.

Section 5(3) of Measure 49 states that a claimant who filed a Measure 37 claim before the legislature adjourned on June 15, 2007 gets compensation in the form of:

“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.” (Italics added)

Measure 49 does not allow vested rights claims to be transferred to new owners, which means that only the current claimant can develop the property under the Measure 37 claim. Once developed, the vested claim is called a non-conforming use because it violates the zoning

code. A non-conforming use can continue to exist, but there are limits on any expansion or replacement of structures and uses. (See below for “Nonconforming Uses.”)

Vested Rights Defined

“Vested rights” is a common law legal theory, which means that it is defined by the courts rather than by statute.

The key vested rights case in Oregon is *Clackamas County v. Holmes*, 265 Or 193 (1973). Under this and subsequent Oregon court decisions, whether a person has a vested right is determined on a case-by-case basis, considering the following factors:

1. The ratio of the money spent to the total cost of the development.
2. The good faith of the landowner.
3. Whether the money spent could only be used for this otherwise illegal type of development or could apply to other legal land uses instead.
4. The nature of the development, its location and ultimate cost.

There are no guarantees in a vested rights case because a court will weigh the evidence for each factor and make a determination that the court believes is equitable, or fair.

Ratio

The first factor is how much money the claimant has spent on the Measure 37-related development compared to the total cost of the project. Even substantial expenditures are not enough if they are only a small portion of the overall cost of the development. The court in *Holmes*, citing other cases, stated that “the acts of the landowner should rise beyond mere contemplated use or preparation.” In other words, in most cases some level of physical work must have been started at the site.

Good Faith

Did the Measure 37 claimant begin or continue the development activity in good faith? Establishing good faith is key in court decisions on vested rights claims and is decided on a case-by case basis. Courts look at several issues in evaluating whether the claimant proceeded in good faith.

House Bill 3540, which referred Measure 49 to the ballot, was effective on June 15, 2007. After that date, all Measure 37 claimants knew or should have known that their right to develop under Measure 37 would change if Measure 49 passed. Voters passed Measure 49 on November 6 and it becomes effective on December 6, 2007.

A court would *probably* find that development before June 15 was undertaken in good faith, but that development after November 6 was not. However, it is unclear how a court would view actions between those dates. It is also unclear how a court would view development that occurred between November 6, when voters adopted Measure 49 and December 6, when Measure 49 takes effect.

The Department of Land Conservation and Development (DLCD), relying on the *Holmes* case, describes good faith as “[w]hether the property owner had notice of the proposed change in law before beginning the development.”¹ Under this standard, it may be difficult to show that any development activities undertaken after June 15 were done in good faith. One law firm advises that “[a]fter the passage of HB 3540 and the press coverage associated with it, one can imagine a court concluding that any landowner would be on notice of potentially significant changes to the relief available under the waiver system.”²

Case law in jurisdictions outside of Oregon is clear: development activity after the developer knew that change to the law was pending is not in good faith. *Stowe v. Burke*, 122 S.E.2d 374 (NC 1961). Oregon courts are not bound by state decisions elsewhere, but may choose to apply this standard.

Other factors relating to good faith are: (1) whether the claimant had all necessary final approvals (including permits) before starting construction, (2) whether the claimant started or accelerated development work after it was clear Measure 49 would be on the ballot and/or after voters passed the measure, (3) whether the claimant tailored the work to make the development consistent only with Measure 37-based development, and (4) any statements the claimant made relating to good faith that can be used as evidence in court.

Although the defendant in the *Holmes* case did not have a building permit, the court still found that his rights had vested. This is because the defendant did not need a building permit because he had not yet begun constructing buildings. However, a developer’s vesting claim would weaken if building construction began without a permit.

Other Uses

The third factor from the *Holmes* case is whether the money spent to develop the site relates only to the type of development now barred by Measure 49, or whether it could instead be used for a type of development Measure 49 allows. For example, if a claimant with a valid Measure 37 claim builds a road for a large subdivision prohibited by Measure 49, can the road also serve the fewer number of houses allowed by Measure 49? Based on the common law, a court will determine how much construction has already been done and whether it can be adapted to the uses allowed under Measure 49. That construction need not be *perfectly* suited to what is permitted under Measure 49. Given this factor, claimants may try to tailor their construction activities to uses that were allowed under Measure 37, but not under Measure 49.

The claimant’s choices for development may also feed into the court’s assessment of good faith, as discussed above.

Nature of Development

The last factor cited by the Oregon Supreme Court is the nature of the development itself, its location, and the ultimate cost. Here a court may consider the feasibility of the project at that location. The court in *Holmes* did not discuss this factor in any detail.

¹ <http://www.oregon.gov/LCD/MEASURE37/> Under “Current Topics,” select “Measure 37 & Proposed Ballot Measure 49 Q&A.”

² http://www.dwt.com/practc/realprop/bulletins/08-07_Measure49.htm. Search date October 24, 2007.

How to tell if a Claimant is trying to Vest a Measure 37 Claim

Under Measure 49, the DLCD has up to 120 days after December 6 (which is April 6, 2008 at the latest) to send a form to all Measure 37 claimants, even those claimants whose claim was denied; asking them to select one of the options provided by Measure 49. Claimants have up to 90 days to respond. Therefore, 210 days (9 months) may pass before claimants respond or clearly fail to respond to the DLCD form. Claimants who do not respond to DLCD may be trying to vest their claims under Measure 37.

There are two ways to determine if a claimant plans to claim a vested right.

The first is to determine what the claimant is doing to develop the property. This requires discovering whether the claimant is developing beyond Measure 49 limits *or* without needed permits. If a Measure 37 claimant is installing septic systems, drilling wells, building roads, or building more than three houses before receiving the notice from DLCD, there is a serious possibility the claimant is trying to vest their Measure 37 claim. You will need to do some research to find out about the claim, the permits, and any provisions your local government has created to handle potentially illegal development. See the “Checklist for Vested Rights Claims” for specific questions to ask. Most of the information you will need is publicly available.

The second way is find out what the claimant reported in response to the DLCD notice. This approach might take longer than the first –since the period for DLCD to provide notice and receive a response could take 9 months - and may make it harder to get relief if the claimant is currently developing their land

Because this is a long period of time, if you are concerned that a particular claim violating Measure 49 is being built out, you should monitor development activity and gather publicly available information. You should take photographs and date them to document when the work occurred. However, under no circumstances should you trespass onto the property.

If a development is not allowed by Measure 49 and is not a valid vested rights claim, the County must enjoin, or stop, the development activity.

Local Rules on Vesting

To develop legally, at some point claimants will have to get a determination of whether their development right is vested.

Some counties and cities have ordinances that address vested rights - or “perfecting” a permit. Local ordinances typically establish the criteria the local government will use to determine whether the permit holder has undertaken enough development to either get an extension of the permit or, because there has been a subsequent change in the law, allow the permitted development to continue even if it is now illegal or nonconforming. Ask your local planning department whether there is such an ordinance.

If you have a local ordinance that addresses this question, it would be prudent to monitor all local land use actions so you know whether a claimant has asked the local government to affirm a vested right. (See “What To Do” below) If such a request is made, be sure to participate in the local process.

Regardless of the local ordinance language, state common law governs this issue. Local ordinances cannot override the common law of vesting.

Confirming Vested Rights

A claimant seeking to develop under a vested rights claim might first go to the local government asking it to affirm that the claimant has a vested right pursuant to a local ordinance, if one exists. Neighbors might not be notified of this request, so it is important to monitor your local government's list of all pending land use actions once you believe a vested right claim is active in your area. If your local government does not have a relevant ordinance provision, contact DLCD and consult an attorney to understand what your legal options are.

DLCD played an integral role in determining the validity of Measure 37 demands and continues to have jurisdiction over transferability issues. As described above, every Measure 37 claimant is required to let DLCD know how they intend to proceed under Measure 49. Local governments should be encouraged to coordinate with DLCD.

Finally, a claimant might continue to develop as though they have a vested right to do so and wait to be stopped by neighbors going to court or by local or state governments issuing enforcement orders to stop the development. If you are a concerned neighbor, contact DLCD and the local County to notify them to take action to stop the development.

Status of Claims Developed Under Vested Rights: Non-conforming Uses

If it has been determined through a local process or the courts that a development right has been vested, the claimant may complete the development. However, the resulting development will have a different legal status than other developments.

Development under a "vested right" theory creates a non-conforming use because the development does not conform to the underlying zoning, but rather was built under a waiver of that zoning under Measure 37. State law on non-conforming uses is found in [ORS 215.130](#). Local rules on non-conforming uses can be more restrictive than state law, but they cannot be less restrictive.

A non-conforming use allows a use that was once legal, but no longer is, to continue with some restrictions. Under state law, the use or structure cannot expand or become more intense. This means that anyone buying or leasing a vested right development is purchasing a nonconforming use. You should assume that not all buyers or tenants will be aware of this restriction or its significance.

What to do if a Claimant is Developing Without a Vested Right?

If you believe a neighbor is pursuing a Measure 37 development that exceeds Measure 49 limits, you will need to challenge this development.

As noted above, some Measure 37 claimants will have legitimately vested the right to continue their development. However, many, if not most, will not. Neighbors of claimants that have not legitimately vested their right but are attempting to proceed anyway have several options.

Deciding which court to go to can be complex, since the appropriate forum depends on the issues involved. Determining the appropriate procedural mechanism can be complex. We recommend consulting an attorney from the start.

If you believe an illegal development is occurring (a Measure 37 claim that is proceeding without all the necessary permits and waivers) and your local code describes the process the local government must use to stop a potentially illegal development, you should consider using that process. Local governments often have the ability to order work stopped on developments that do not fully comply with the law.

If the local government refuses to take action, and/or if such a process is not available, you might be able to bring a legal enforcement action in your local circuit court. The challenge might be against the county for failure to enforce its own code, against the claimant, and/or against other parties. To have standing in court to bring this type of lawsuit, you must show you are adversely affected and aggrieved by the improper Measure 37 activity.

Neighbors who want to stop a claimant from continuing to develop the property under Measure 37 would most likely seek relief in the circuit court in the county in which the land is located. It is up to the neighbors of the claimant to ask the court to issue an order stopping any more construction.

Specific Actions to Take

1. Hire an attorney to pursue this challenge.

1000 Friends of Oregon can refer you to qualified attorneys. You can also contact the [Oregon State Bar](#). Be certain the attorney you contact has done a conflicts check and does not have any conflicts with your case from representing Measure 37 claimants or other interested parties.

2. Contact your local government to review the entire file of the Measure 37 claim and any subsequent applications. Get certified copies of any approvals or other decisions.

In addition, remember to:

- a. Ask your county planning department to point out procedures in the local code for stopping potentially illegal development.
 - b. Follow the process in the local code where possible. Whether or not your local code addresses illegal development, alert your county in writing, keeping a copy for yourself, of possibly illegal development under Measure 37. Also keep a copy of any response you receive. Note that the responsible official may be in the building, enforcement, sanitation, and/or planning departments, depending on the structure of your local government.
3. Keep a log, with dates, of your neighbor's development activity on their Measure 37 claim. This is a great activity for all the surrounding neighbors to do and compare. Dated notes and pictures are helpful information for preparing to stop an improper vested rights claim.

NOTE: It is illegal for you to go onto, or put objects on, your neighbor's property without permission. You may not lawfully step foot on a claimant's land to take pictures or look at what is happening unless the landowner has given you permission specifically for this purpose. You may stand on your own property or in a public right-of-way (such as a public road) to take pictures. Even if you believe you have a right to be where you are, the evidence you gather while trespassing will likely not be admitted before a court.

4. Notify your local land use watchdog group and [1000 Friends of Oregon](#) if you think you have a vested rights issue near you.

Identifying a Valid Vested Rights Claim

Below are the relevant facts and circumstances that could give rise to a **valid** vested rights claim to develop under Measure 49. These are the general characteristics of a solid vested rights claim and are not based on any specific claim:

- The claimant has a valid Measure 37 claim.
- Final local and state approval to build has been received, including all necessary waivers, land division approvals, and building permits.
- The landowner spends his or her own money to develop and is not simply a “front” for investor-developers.
- The landowner spends a significant portion of the total development price before June 15, 2007. That is the date HB 3540, which was referred to the voters to become Measure 49.
- The pace of development activity that can be demonstrated in court did not increase along with the likelihood that Measure 49 would become law.
- The specific development is not consistent with development that could occur under Measure 49. For example, the development is commercial development that has been constructed past the point where it could feasibly instead become residential development consistent with Measure 49.

Measure 37 to 49 Timeline

December 2004 – Measure 37 passes.

June 15, 2007 – The day of adjournment of the 2007 Oregon Legislature. Measure 49 has been referred to the ballot and is now *PENDING*. All claimants knew or should have known of a proposed change in the law.

Nov. 6: Election Day. Voters pass Measure 49 and the law is official ENACTED.

Dec. 6: The provisions of Measure 49 become EFFECTIVE.

April 6, 2008: The date by which DLCD forms must be mailed to claimants.

90 days after DLCD mails the forms, the claimants must file their election of which track they choose under Measure 49.

180 days after the claimant files the election the appraisal is due if the claimant seeks to build more than 3 houses under Measure 49.

This Citizen's Guide is intended for general information only and does not constitute legal advice. Anyone affected by these issues is urged to contact an attorney for guidance.

The [Crag Law Center](#) and [Goal 1 Coalition](#) have both provided assistance in the creation of this guide, for which we are grateful. Any errors, of course, remain our own.

For further information on the common law definition of a vested right, visit www.crag.org/justcompensation, or click on the Measure 37 to 49 Help Page at www.crag.org.