

Ballot Measure 49 and the Common Law of Vested Rights
Guidance from the Oregon Department of Land Conservation & Development
and the Oregon Department of Justice¹
December 31, 2007

Section 5(3) of Ballot Measure 49 provides that:

A claimant that filed a claim under ORS 197.352 on or before * * * [June 28, 2007] is entitled to just compensation [for land use regulations enacted before January 1, 2007] 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.

1. Does Ballot Measure 49 affect a use that is fully-developed under Measure 37?

No. If a claimant has completed the home(s) (or other use) that they received a Measure 37 waiver for, section 5(3) of Measure 49 means that the claimant has the right to continue a use that was established lawfully. If the claimant has completed only part of the development, however, whether the claimant may complete the entire home, development or other use depends on whether the claimant has a common law vested right to do so. The meaning of common law vested rights is addressed in the next question.

2. Under Ballot Measure 49, if a claimant has a common law vested right to complete and continue a use based on a Ballot Measure 37 "waiver" as of December 6, 2007, the claimant may proceed with that use. What is a common law vested right, and when does a claimant have such a right?

In general, the right to complete and continue a use of real property when the law changes is known as a "vested right." Under decisions of the Oregon courts, whether a person has a vested right to complete a use (despite a change in law)

¹ This guidance is not intended as legal advice for any person or city or county. Property owners, other persons, and local governments should consult with their own attorney concerning these matters. This guidance also is general in nature; DLCDC and DOJ are continuing to evaluate vested right issues in the context of particular Measure 37 claims, permit applications, and pending court cases.

is an issue of fact, to be decided on a case-by-case basis. *Clackamas County v. Holmes*, 265 Or 193, 197 (1973). For an owner to have acquired a vested right to proceed with construction, the commencement of construction must have been substantial or substantial costs toward completion of the development must have been incurred. *Id.* Factors that the Oregon appellate courts have considered in determining whether a particular development has progressed to the point where the owner has a vested right include:

- The amount of money spent on developing the use in relation to the total cost of establishing the use;
- The good faith of the property owner;
- Whether the property owner had notice of the proposed change in law before beginning the development;
- Whether the improvements could be used for other uses that are allowed under the new law;
- The kind of use, location and cost of the development; and
- Whether the owner's acts rise beyond preparation (land clearing, planning, etc.).

3. Who has authority to decide whether a development or use has progressed far enough to be vested at common law for purposes of Ballot Measure 49?

- Cities and counties have authority to decide whether a use is vested. *1000 Friends of Oregon v. Clackamas Co. Comm.*, 29 Or App at 620 (1977). However, any action by a city or county to determine whether a development or use has progressed far enough to be vested at common law must be based *on the common law*; local governments do not have the authority to adopt ordinances purporting to establish some other test for when a use is vested. *1000 Friends v. LCDC*, 78 Or App 270, 275-278 (1986).
- Circuit courts also have authority to decide whether a use is vested. The governing body of a county, or any person whose interest in real property in the county is or may be affected by the development, may seek a court determination of whether there is a vested right, or seek to enjoin a development if it is proceeding unlawfully. ORS 215.185.

4. If a city or county decides whether a use is vested, where would that decision be reviewed?

- Normally, a decision that a use is vested that is made by a city or a county would be a land use decision reviewed by the Oregon Land Use Board of Appeals (LUBA). *Forman v. Clatsop County*, 63 Or App 617 (1983); *aff'd* 297 Or 129 (1984).

- However, under Ballot Measure 49, section 4(7), a decision by a public entity concerning whether a person qualifies for *just compensation* under section 5 ("just compensation" is defined to include relief under section 5, including whether a person qualifies as having a vested right under subsection 5(3)) is not a land use decision. Or. Laws 2007 Ch. 424 (Ballot Measure 49), section 4(7). As a result, it is likely that review of a city or county decision concerning whether a claimant has a common law vested right under Measure 49, made after the effective date of Measure 49, would be as a writ of review in the circuit court rather than with LUBA.

5. Are the following sufficient for a claimant to have a common law vested right to carry out a use under Measure 49, section 5(3):

a. The issuance of a “waiver” under Ballot Measure 37 authorizing the claimant to carry out a use of the property? The issuance of a Ballot Measure 37 waiver does not, by itself, create a common law vested right to complete development of a use of the property. *Crook County v. All Electors*, Crook County Cir. Court No. 05CV0015 (Letter Opinion dated August 1, 2006); *Jackson County v. All Electors*, Jackson County Cir. Court No. 05-2993 (Order on Cross Motions for Summary Judgment dated January 19, 2007).

b. The claimant’s submission of an application for a development permit to carry out a use of the property under a Ballot Measure 37 “waiver?” The submission of an application for a development permit does not, by itself, create a *common law* vested right to complete development of a use of the property. Or. Laws 2007 Ch. 424 (Ballot Measure 49), section 5(3). The "goal post" statute in ORS 215.427(3) is *not* a form of *common law* vesting. In a related context, the State has taken the position before the Land Use Board of Appeals that under Ballot Measure 37, if the applicant for the permit passes away, the "goal post" statute does not "vest" the new applicant with the decedent's Measure 37 waiver. *DLCD v. Jefferson County*, LUBA No. 2007-177 (State’s Petition for Review).

c. The issuance of a development or utility permit authorizing the claimant to carry out a use of the property? The issuance of a development permit does not, by itself, create a common law vested right to complete development of a use of the property. *K.R.A.M Corp. v. City of Vernonia*, 95 Or App 534 (1989), *rev. den.* 308 Or 142; *Lemke v. Lane County*, 57 Or App. 55, n.2 (1982), *rev. den.* 293 Or 294.

d. The issuance of a building permit authorizing the claimant to carry out a use of the property? The issuance of a building permit for construction of a use does not, by itself, create a common law vested right to complete construction of the use. *Twin Rocks Watseco Defense Com. V. Sheets*, 15 Or App 445 (1973).

e. The recording of a final plat, creating new lots or parcels? The recording of a final plat gives the owner of the property the legal right to convey the lots or parcels created by the plat. ORS 92.016-025. *However*, the fact that a lot or parcel is lawful and that it may be sold does not mean that the new owner has any vested right to use that lot or parcel in a particular way. *Parks v. Tillamook Co. Comm.*, 11 Or App 177, 196 (1972); *Columbia Hills Dev. Co. v. Land Conservation & Dev. Com.*, 50 Ore. App. 483, 490 (1981). In the context of Ballot Measures 37 and 49, the claimant's use of the property must be vested. If that use is to develop the property for one or more homes, the claimant must have a common law vested right to complete the development of the homes. Dividing the property into lots or parcels does not, by itself, create a common law vested right to build homes or carry out some other physical use of the property. *Yamhill County v. Ludwick*, 294 Or 778 (1983).

6. What will happen if a claimant develops the property without first obtaining the permits required for the development? Any development that occurs without permits that are lawfully required will not be considered in determining whether the use has vested at common law. Grading, clearing, building and development permits must be in place before activity begins in order to be considered. *Mason v. Mountain River Estates, Inc.*, 73 Or App 334, 337-340 (1985).

7. Is a right to complete and continue a use transferable under Measure 49?

Section 11(6) of Measure 49 provides that: “[a]n authorization to partition or subdivide the property, or to establish dwellings on the property, granted under section 6, 7 or 9 of this 2007 Act runs with the property and may be either transferred with the property or encumbered by another person without affecting the authorization.” As a result, if claimants choose to proceed under the "express" or "conditional" paths of Ballot Measure 49, any home site approval that they receive will be transferable. However, Ballot Measure 49 does not affect the transferability of Measure 37 waivers or of development carried out based on those waivers.