

BOARD OF COUNTY COMMISSIONERS

KLAMATH COUNTY, OREGON

IN THE MATTER OF ADOPTING THE MEASURE 49)
VESTED RIGHTS ORDINANCE TO ESTABLISH A) ORDINANCE NO. 83
PROCESS TO DETERMINE WHETHER AN)
APPLICANT HAS A COMMON LAW VESTED RIGHT)
TO COMPLETE AND CONTINUE A USE ALLOWED)
BY A MEASURE 37 WAIVER; DECLARING AN)
EMERGENCY; EFFECTIVE MAY 27, 2008)
_____)

WHEREAS, On November 2, 2004, the voters of the State of Oregon approved Ballot Measure 37 which added provisions to Oregon Revised Statutes (ORS) Chapter 197 to require, under certain circumstances, payment of just compensation to landowners if a government land use regulation reduced property value. In lieu of payment of just compensation, Ballot Measure 37 authorized the governing body of a local government to modify, remove or not apply the land use regulation, such actions being generally referred to as "Measure 37 waivers."); and

WHEREAS, Measure 37 was codified as ORS 197.352 (2005 replacement part); and

WHEREAS, beginning with the first Measure 37 claim filed December 9, 2004, the Board approved multiple Measure 37 waivers in lieu of payment of just compensation. The waivers were approved in accordance with the procedures set out by the County; and

WHEREAS, in June, 2007, the Legislative Assembly referred House Bill 3540 to the voters, which substantially amended ORS 197.352; and

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WHEREAS, House Bill 3540 was considered by the voters in the election of November 6, 2007, as Ballot Measure 49, which the voters approved and Measure 49 became effective December 6, 2007; and

WHEREAS, Section 2 (13) of House Bill 3540 establishes the following definition for "just compensation":

"SECTION 2 (13) 'Just compensation' means:

(a) Relief under sections 5 to 11 of this 2007 Act for land use regulations enacted on or before January 1, 2007 ; and

(b) Relief under sections 12 to 14 of this 2001 Act for land use regulations enacted after January 1, 2007." ; and

WHEREAS, Section 4 (7) of House Bill 3540 provides as follows with respect to judicial review of a County's Vested Right Determination:

"SECTION 4 (7). A decision by a public entity that an owner qualifies for just compensation under sections 5 to 22 of this 2007 Act and a decision by a public entity on the nature and extent of that compensation are not land use decisions"; and

WHEREAS, Section 5 of House Bill 3540 provides as follows with respect to development of property in accordance with Measure 37 relief:

"SECTION 5. A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly 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"; and

WHEREAS, Section 16 of House Bill 3540 provides as follows with respect to judicial review of decisions made under the new law:

"SECTION 16. (1) A person that is adversely affected by a final determination of a public entity under sections 5 to 11 or 12 to 14 of this 2007 Act may obtain judicial review of that determination under ORS 34.010 to 34.100, if the determination is one of . . . a county. . . A determination by a public entity under sections 4 to 11 or 12 to 14 of this 2007 Act is not a land use decision.

(2) A person is adversely affected under subsection(1) of this section if the person:
(a) Is an owner of the property that is the subject of the final determination; or
(b) Is a person who timely submitted written evidence, arguments or comments to a public entity concerning the determination.

(3) Notwithstanding subsection (1) of this section judicial review of a final determination under sections 5 to 11 or 12 to 14 of this 2007 Act or ORS 197.352 is:
(a) Limited to the evidence in the record of the public entity at the time of its final determination.
(b) Available only for issues that are raised before the public entity with sufficient specificity to afford the public an opportunity to respond"; and

WHEREAS, the State of Oregon has determined that a local government may determine vesting rights under Section 5 (3) of House Bill 3540 for those Measure 37 waivers the local government issued. Thus, it is appropriate to establish a process by which Klamath County shall determine

whether a "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."

NOW, THEREFORE, the Klamath County Board of Commissioners ordains as follows:

MEASURE 49 VESTED RIGHTS ORDINANCE

Section 1. Definitions. For purposes of this ordinance, the following definitions apply.

1.01 "Applicant" means a person who has obtained Measure 37 relief from the Board and the State of Oregon, and has applied to the Planning Department for a Vesting Decision.

1.02 "Application" means an application form created by the Planning Director and filed with the Planning Department by an Applicant for a Final County Vesting Decision.

1.03 "Board" means the Klamath County Board of Commissioners (BOCC).

1.04 "Completed Application" means an Application deemed complete by the Review Authority.

1.05 "Planning Department" means the Planning Division of the Klamath County Community Development Department.

1.06 County Vesting Decision means a written decision by the Review Authority on an Application that the Applicant does or does not have a vested right to continue and complete a use allowed under a Board Order granting the Applicant Measure 37 relief.

1.07 Final County Vesting Decision means an Order of the BOCC pursuant to an appeal of a Vesting Decision or a Vesting Decision that has not been appealed to the BOCC within the requisite time as mandated by the Ordinance.

1.08 "Measure 37" means Ballot Measure 37 approved by the voters on November 2, 2004 and codified as ORS 197.352, 2005 replacement part.

1.09 "Planning Director" means the Klamath County Planning Director.

1.10 "Review Authority" is the Planning Director.

Section 2. Determination of Vested Rights under House Bill 3540 (HB 3540), Section 5 (3).

2.01 Review Authority to Make Determination. In accordance with the process described in Section 2.03, the Review Authority shall determine vested rights under HB 3540, Section 5(3) pursuant to the criteria set forth in Section 4 of this Ordinance. Absent a timely appeal of the Vesting Decision, it shall be a Final Vesting Decision **not subject to** judicial review.

2.02 Basis of Determination. The Review Authority must base a Vesting Decision on whether the Applicant's use of the property complies with orders from the State and Board granting Measure 37 relief, and whether the Applicant has a common law vested right as of December 6, 2007, to complete and continue the use described in the waiver, such determination being made pursuant to the criteria set forth in Section 4 of this ordinance.

2.03 Process. The Review Authority shall make a Vesting Decision under this ordinance in accordance with the process described in this subsection.

2.03.01 An Applicant who obtained an order from the Board granting Measure 37 relief and who desires the County to make a vested rights determination under HB 3540, Section 5(3) shall submit an Application to the Planning Department with information necessary to address the criteria to establish a common law vested right. The Review Authority is empowered to determine when the Application becomes a Completed Application and may require additional information beyond that originally submitted where necessary to address the criteria to establish a common law vested right. The Applicant is responsible for the completeness and accuracy of all information submitted with the Application and all of the supporting documentation.

2.03.02 The Review Authority will exercise best efforts to make a timely decision on a Completed Application.

2.03.03 If no comments from persons other than the Applicant are received by 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01, the record is closed and the Review Authority will make a Vesting Decision on the record as it exists at that time.

2.03.04 If comments from persons other than the Applicant are received by 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01, the record before the Review Authority is closed except for rebuttal comments by the Applicant. Rebuttal comments from the Applicant will thereafter be received by the Review Authority until the record is closed on the earlier of (a) the date the Applicant notifies the Review Authority in writing that it desires the record closed; or (b) the 35th calendar day following issuance of notice under Section 5.01.

2.04 Application Materials. An Applicant shall submit the following materials to the Planning Department:

2.04.01 An Application with an application fee, if any, set by Board Order.

2.04.02 The name, mailing address, and phone number of the Applicant.

2.04.03 A legal description and tax lot number of the subject property as well as a street address for the property, if any.

2.04.04 A copy of the State of Oregon order granting the Applicant Measure 37 relief for the subject property.

2.04.05 Additional information deemed appropriate by the Applicant to enable the Review Authority to make a Final County Vesting Decision.

2.05 Vesting Decision Subject to Appeal to the BOCC. The determination of the Review Authority may be appealed to the BOCC. Any person receiving notice of the vesting decision or otherwise demonstrably affected by the vesting decision may appeal the decision to the BOCC within 7 days of the mailing of the notice of the Vesting Decision.

2.05.01 Notice of intent to appeal shall be in accordance with Article 33 of the Klamath County Land Development Code.

2.05.02 The hearing before the BOCC shall occur within 90 days of the filing of a notice of intent to appeal.

2.05.03 The hearing shall, in general, be in accordance with Article 31 of the Klamath County Land Development Code (KCLDC), but the hearing shall be de novo and none of the KCLDC provisions regarding the Comprehensive Land Use Plan or related review criteria shall apply. The BOCC may rely on any documents or other evidence submitted to the Review Authority but may consider any additional relevant evidence presented at the hearing.

2.05.04 The BOCC shall base its decision solely upon the criteria contained in Section 4 of this Order.

2.05.05 After deliberating to a decision, the BOCC shall issue a written Order, which shall be a Final Order for purposes of judicial review. The decision of the BOCC is not a land use decision that may be reviewed by the Land Use Board of Appeals.

2.06 BOCC Decision Subject to Judicial Review. The decision of the BOCC is a Final Vesting Decision subject to Judicial Review as provided in Section 6 of this ordinance.

Section 3. Comments by Persons other than the Applicant.

3.01 A person may submit written evidence, arguments or comments to the Planning Department for consideration by the Review Authority until 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01. No evidence, arguments or comments from persons other than the Applicant will be received by the Planning Department for consideration by the Review Authority after 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01.

Section 4. Factors Considered in Vesting Decision.

4.01 In determining whether the applicant has a vested right to continue and complete a use allowed under a Board Order granting Measure 37 relief, the Review Authority and the BOCC, as necessary, must consider the following factors based on the evidence submitted in the application:

4.01.01 The amount of money spent on developing the use in relation to the total cost of establishing the use.

- 4.01.02 The good faith of the property owner.
- 4.01.03 Whether the property owner had notice of the proposed change in law before beginning development.
- 4.01.04 Whether the improvements could be used for other uses that are allowed under the new law.
- 4.01.05 The kind of use, location and cost of the development.
- 4.01.06 Whether the owner's acts rise beyond more contemplated use or preparations, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.
- 4.01.07 Other relevant factors.

Section 5. Notice of the Application; Notice of the Decision on the Application; Notice of BOCC Decision on Appeal

5.01 Notice of the Application. Not later than 5 working days after the Review Authority's determination that an Applicant has submitted a Completed Application, the Planning Department shall provide notice of the Completed Application by first class U. S. mail, postage prepaid, to the persons named in this subsection. The date of mailing shall be included in the notice. The notice shall include the name of the Applicant and the location of the subject property. Notice shall be issued to the following:

- 5.01.01 The Applicant.
- 5.01.02 The public, by the following means: (a) Posting notice of the Completed Application at a public place within the Planning Department; (b) posting notice of the Completed Application on the Klamath County website; and (c) publishing notice of the Completed Application in a newspaper of general circulation in Klamath County.
- 5.01.03 The Department of Land Conservation and Development.
- 5.01.04 Owners of real property located within 500 feet of the property that is subject to the Final County Vesting Decision as those owners are identified by existing records in the Klamath County Assessor's Office.

5.02 Notice of the Review Authority Vesting Decision. Not later than 5 working days after the Review Authority has made and signed a Vesting Decision, the Planning Department will provide notice of the decision by first class U.S. mail, postage prepaid, to the persons named in

this subsection. The date of mailing shall be included in the notice. Notice shall be issued to the following:

5.02.01 The Applicant.

5.02.02 The public, by the following means:
(a) Posting notice of the Final County Vesting Decision at a public place within the Planning Department and (b) posting notice of the Final County Vesting Decision on the Klamath County website.

5.02.03 The Department of Land Conservation and Development.

5.02.04 A person who submitted written evidence, arguments or comments on the Application to the Planning Department before the Review Authority made and signed a Final County Vesting Decision on the Application.

5.03 Notice of the BOCC Decision. If a Vesting Decision has been appealed to the BOCC, the BOCC decision shall be noticed pursuant to Section 5.02.

Section 6. Review of Vesting Decisions.

6.01 A Vesting Decision of the Review Authority made under this ordinance is not a land use decision subject to review by Oregon's Land Use Board of Appeals. Review of a Vesting Decision must be pursuant to Section 2.05 of this ordinance.

6.02 A Vesting Decision that has become Final due to lack of appeal is not a land use decision subject to review by Oregon's Land Use Board of Appeals and is not subject to judicial review unless it has been appealed to the BOCC.

6.03 A BOCC decision on an appeal of a Vesting Decision is not a land use decision subject to review by Oregon's Land Use Board of Appeals. A BOCC decision is subject to judicial review.

6.04 Judicial review shall be pursuant to ORS 34.102.

6.05 Judicial review of a Final County Vesting Decision of the Review Authority is:

6.05.01 Limited to the evidence in the record before the Review Authority at the time it made and signed a Final County Vesting Decision, and

6.05.02 Available only for issues that are raised before the BOCC with sufficient specificity to afford Klamath County and the Applicant an opportunity to respond.

6.06 For purposes of ORS 34.030, the "date of the decision or determination sought to be reviewed" is the date notice was issued under Section 5 of this ordinance.

Section 7. Effect of Vested Rights Determination on Subsequent Owners.

7.01 A Final County Vesting Decision by the Review Authority under this ordinance shall apply to a future owner or otherwise run with the land to the fullest extent allowed by law when the Final County Vesting Decision determines that:

7.01.01 An applicant's use of the property complies with the Measure 37 waiver issued by the Board; and

7.01.02 The applicant has a common law vested right as of December 6, 2007, to complete and continue the use described in the waiver.

Section 8. Rules for Computing Time.

8.01 ORS 174.120, 2005 replacement part, applies for purposes of computing time and deadlines under this ordinance.

Section 9. Title.

9.01 This ordinance may be cited as the Measure 49 Vested Rights Ordinance.

Section 10. Severability.

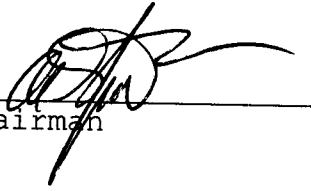
10.01 All sections, subsections and paragraphs of this ordinance are severable. If any section, subsection, or paragraph is ruled invalid for any reason by the court of last resort, the other parts of this ordinance shall be unaffected.

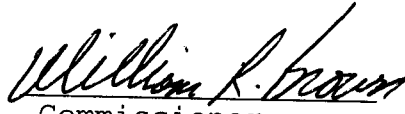
Section 11. Effective date; emergency clause.

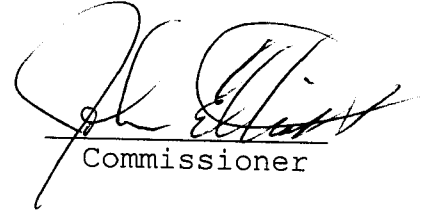
11.01 The first and second readings of this ordinance were made May 13, 2008 and May 27, 2008. To carry out the intent of this ordinance an emergency is hereby declared to exist. In accordance with ORS 203.045(4) this ordinance shall take effect on May 27, 2008.

DONE and DATED this 27th day of May, 2008.

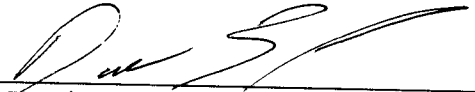
KLAMATH COUNTY BOARD OF COMMISSIONERS


Chairman

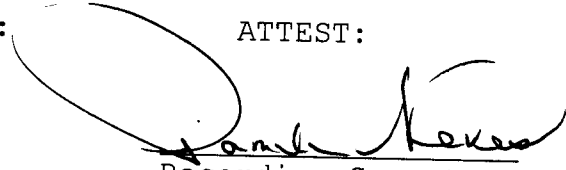

Commissioner


Commissioner

APPROVED FOR LEGAL SUFFICIENCY:


W. Daniel Bunch
Klamath County Counsel

ATTEST:


Recording Secretary