

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of Adopting the Measure 49 Vested)
Rights Ordinance to Establish a Process to Determine)
Whether an Applicant has a Common Law Vested) ORDINANCE No. 823
Right to Complete and Continue a Use allowed by a)
Measure 37 Waiver; Declaring an Emergency;)
Effective December 21, 2007.)

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY, OREGON ("the Board") sat for the transaction of county business in formal session on December 19, 2007, commissioners Mary P. Stern and Leslie Lewis participating. Commissioner Kathy George did not participate.

THE BOARD MAKES THE FOLLOWING FINDINGS:

A. 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 are generally referred to as "Measure 37 waivers.")

B Measure 37 was codified as ORS 197.352 (2005 replacement part).

C. Beginning with the first Measure 37 claim filed in December, 2004, the Board approved multiple Measure 37 waivers in lieu of payment of just compensation. The waivers were approved in accordance with the Board's ordinance implementing Measure 37, Ordinance 749, as amended.

D. In June, 2007 the Legislative Assembly referred House Bill 3540 to the voters. House Bill 3540 substantially amended ORS 197.352. House Bill 3540 was considered by the voters in the election of November 6, 2007 as Ballot Measure 49. The voters approved Measure 49, and Measure 49 became effective December 6, 2007.

E. 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 2007 Act for land use regulations enacted after January 1, 2007.

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F. 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.

G. 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.

H. 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 5 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.

I. 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 for Yamhill County's determination of 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 YAMHILL COUNTY BOARD OF COMMISSIONERS HEREBY ORDAINS AS FOLLOWS:

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 Department of Planning and Development for a Final County Vesting Decision.
- 1.02 “Application” means an application form created by the Planning Director and filed with the Department of Planning and Development by an Applicant for a Final County Vesting Decision.
- 1.03 “Board” means the Yamhill County Board of Commissioners.
- 1.04 “Completed Application” means an Application deemed complete by the Review Authority.
- 1.05 “County Counsel” means the Yamhill County Counsel, or with the County Counsel’s consent, the Assistant Yamhill County Counsel.
- 1.06 “Department of Planning and Development” means the Yamhill County Department of Planning and Development.
- 1.07 “Final County Vesting Decision” means a final 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.
- 1.08 “Independent Vesting Officer” means an attorney admitted to practice law in the State of Oregon who was hired by the County Counsel at the request and with the consent of the Planning Director.
- 1.09 “Measure 37” means Ballot Measure 37 approved by the voters in November, 2004 and codified as ORS 197.352, 2005 replacement part.
- 1.10 “Planning Director” means the Yamhill County Planning Director.
- 1.11 “Review Authority” is the Planning Director or an Independent Vesting Officer.

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

- 2.01 Review Authority to make determination. In accordance with the process described in Section 2.05, the Review Authority shall determine vested rights under HB 3540, Section 5(3) pursuant to the test established by common law as reflected in Section 4.
- 2.02 Delegation of authority. The Board hereby delegates authority to the Review Authority to make a Final County Vesting Decision on vested rights under HB 3540, Section 5(3) pursuant to the test established by common law.
- 2.03 Determination subject to judicial review. The Final County Vesting Decision is subject to Judicial Review as provided in Section 6 of this ordinance.

- 2.04 Basis of determination. The Review Authority must base its Final County 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.
- 2.05 Process The Review Authority shall make a Final County Vesting Decision under this ordinance in accordance with the process described in this subsection.
- (1) 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 Department of Planning and Development 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) The Review Authority will exercise its best efforts to make a timely decision on a Completed Application.
 - (3) 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 Final County Vesting Decision on the record as it exists at that time.
 - (4) 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.
- 2.06 Application materials. An Applicant shall submit the following materials to the Department of Planning and Development:
- (1) An Application with an application fee, if any, set by Board Order.
 - (2) The name, mailing address, and phone number of the Applicant.
 - (3) A legal description and tax lot number of the subject property as well as a street address for the property, if any.
 - (4) A copy of the State of Oregon order granting the Applicant Measure 37 relief for the subject property.
 - (5) Additional information deemed appropriate by the Applicant to enable the Review Authority to make a Final County Vesting Decision.

Section 3. Comments by Persons other than the Applicant.

3.01 A person may submit written evidence, arguments or comments to the Department of Planning and Development 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 Department of Planning and Development 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 to Determine Common Law Vested Right.

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 must consider the following factors based on the evidence submitted in the application:

- (1) The amount of money spent on developing the use in relation to the total cost of establishing the use.
- (2) The good faith of the property owner.
- (3) Whether the property owner had notice of the proposed change in law before beginning development.
- (4) Whether the improvements could be used for other uses that are allowed under the new law.
- (5) The kind of use, location and cost of the development.
- (6) Whether the owner's acts rise beyond mere contemplated use or preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.
- (7) Other relevant factors.

Section 5. Notice of the Application; Notice of the Final Decision on the Application.

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 Department of Planning and Development 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:

- (1) The Applicant.
- (2) The public, by the following means:
 - a. Posting notice of the Completed Application at a public place within the Department of Planning and Development.

- b. Posting notice of the Completed Application on the Yamhill County website.
 - c. Publishing notice of the Completed Application in a newspaper of general circulation in Yamhill County.
- (3) The Department of Land Conservation and Development.
 - (4) 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 Yamhill County Assessor's Office.
- 5.02 Notice of the Final County Vesting Decision. Not later than 5 working days after the Review Authority has made and signed a Final County Vesting Decision, the Department of Planning and Development 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:
- (1) The Applicant.
 - (2) The public, by the following means:
 - a. Posting notice of the Final County Vesting Decision at a public place within the Department of Planning and Development.
 - b. Posting notice of the Final County Vesting Decision on the Yamhill County website.
 - (3) The Department of Land Conservation and Development.
 - (4) 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 Yamhill County Assessor's Office.
 - (5) A person who submitted written evidence, arguments or comments on the Application to the Department of Planning and Development before the Review Authority made and signed a Final County Vesting Decision on the Application.

Section 6. Date Final County Vesting Decision Deemed Complete.

- 6.01 The Final County Vesting Decision constitutes a final county decision that is subject to Judicial Review as provided in Section 7 at the time the Review Authority has made and signed a Final County Vesting Decision.

Section 7. Judicial Review of Final County Vesting Decision.

- 7.01 A Final County Vesting Decision of the Review Authority made under this ordinance is not a land use decision subject to review by the Land Use Board of Appeals.
- 7.02 A Final County Vesting Decision of the Review Authority made under this ordinance is subject to review by the Yamhill County circuit court in a Writ of Review proceeding filed under Oregon

Revised Statutes Chapter 34 by an Applicant or a person who is adversely affected by a Final County Vesting Decision. A person is adversely affected for purposes of this section if the person is a person who submitted written evidence, arguments or comments to the Department of Planning and Development before 5 p.m. on the 21st calendar day following issuance of notice under Section 5.01.

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

- (1) Limited to the evidence in the record before the Review Authority at the time it made and signed a Final County Vesting Decision, and
- (2) Available only for issues that are raised before the Review Authority with sufficient specificity to afford the Review Authority and Applicant an opportunity to respond.

7.04 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 5.02.

Section 8. Effect of Vested Rights Determination on Subsequent Owners.

8.01 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:

- (1) An applicant’s use of the property complies with the Measure 37 waiver issued by the Board; and
- (2) The applicant has a common law vested right as of December 6, 2007 to complete and continue the use described in the waiver.

Section 9. Rules for Computing Time.

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

Section 10. Title.

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

Section 11. Severability.

11.01 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.

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Section 12. Effective date; emergency clause.

12.01 The first and second readings of this ordinance were made December 19, 2007. 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 December 21, 2007.

AYES: Commissioners Stern and Lewis.

DONE at McMinnville, Oregon on December 19, 2007.

ATTEST

YAMHILL COUNTY BOARD OF COMMISSIONERS

JAN COLEMAN

County Clerk

(did not participate)

Chair

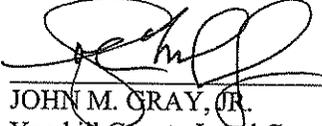
KATHY GEORGE

By: 
Deputy ANNE BRITT

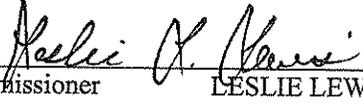

Commissioner

MARY P. STERN

FORM APPROVED BY:



JOHN M. GRAY, JR.
Yamhill County Legal Counsel


Commissioner

LESLIE LEWIS

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