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January 2010

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THE AUGEAN STABLES: MEASURE 49 AND THE HERCULENIAN TASK OF CORRECTING AN IMPROVIDENT INITIATIVE MEASURE IN OREGON

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I. Introduction

With some notable exceptions, the basic structure of the Oregon planning program has remained largely unchanged since 1973, when it was created. However, the relative stability of the program belied stresses caused by perceptions of unfairness to certain landowners. Those perceptions arose principally over reactions to state policies towards resource lands in rural areas and ultimately led to several ballot initiatives to change existing land use policy, including Measures 37 in 2004[1] and 49 in 2007.[2] These measures were reactions to the efforts by the Oregon legislature and state land use agency to reduce land use options available for farm and forest lands and often dealt with efforts to limit or exclude non-resource related dwellings.[3]

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The authors gratefully acknowledge the constructive comments and assistance of Ron Eber, Chris Gilmore, William Kabeiseman, Samuel Lowry, Professor Daniel Mandelker, Washington University in St. Louis, School of Law, Carrie Richter, and Darsee Staley, Oregon Department of Justice, in the preparation of this article.

[1] OR. REV. STAT. § 197.352 (2005). There was a previous attempt in 2000, through Measure 7, to amend the state constitution to create a right to payment from public funds for reduction of property values. While the voters approved this Measure, the Oregon Supreme Court invalidated the Measure for failing to follow the process for amendment to the state constitution. *See generally* Edward Sullivan, *Year Zero: The Aftermath of Measure 37*, 36 Environmental Law 131, 137 (2006) (hereinafter "Year Zero.").

[2] Act of June 15, 2007, ch. 424, § 6(2)(b), 2007 Or. Laws 1138.

[3] For a discussion of Oregon's agricultural lands policy, *see generally* Edward Sullivan and Ronald Eber, *The Long and Winding Road: Farmland Protection in Oregon 1961 – 2009,* 18 S.J.Agric.L.Rev. 1 (2009).

But even these two significant amendments to the program themselves represent a process of incremental change. Measure 37 established a broad policy of either payment of "just compensation" to landowners whose real property values were reduced as a result of land use regulations, or, alternatively, a waiver of many regulations to those in place when the current owner acquired the real property in question.[4] On the one hand, Measure 37 was a significant departure for the Oregon program responding to perceptions that the program had resulted in regulatory inequities to landowners in certain cases. On the other hand, Measure 49 corrected the drafting shortcomings and egregious outcomes of Measure 37, but also devised a new regime to deal with potentially excessive future regulations.

This article reviews the response to Measure 37, beginning with its adoption, including a special note on the relationship between money and politics in the funding of the Measure 37 campaign in 2004. It then proceeds to examine the difficulties imposed on the Oregon land use program by Measure 37 and the very different approach to these perceived regulatory inequities taken by Measure 49, so as to clarify and narrow the eligibility and scope of relief previously provided by Measure 37. Measure 49 also established a narrow path for relief from certain future land use regulations that might be seen as excessive.[5] Again, the relationship between money and politics in the campaign over Measure 49, and subsequent legislation, is examined. More importantly, however, this article focuses upon the mechanics and interpretation of Measure 49 to modify the

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[4] *See generally* Edward Sullivan, *Year Zero,* note 1, *supra*.

[5] Under both Measures 37 and 49, there may be a statutory right to compensation for changes in value due to the land use regulation, even if the state or federal constitutions do not require payment of public funds for this purpose. OR. REV. STAT. § 197.352(5) (2005), OR. REV. STAT. § 195.305(1) (2007), and s*ee generally* Edward Sullivan, *Year Zero,* note 1, *supra,* at 139 – 140.

radical and uncertain relief provided by Measure 37, especially in rural areas where the greatest concerns over regulatory excesses occurred.

In sum, this article outlines the Oregon land use program and chronicles the passage, and significant modification, of a radical initiative measure adopted outside the legislative process. The article examines the relationship of money and politics in the enactment of legislation by the voters, who passed both the initial departure from the land use program by a wide margin, but who then corrected that departure by an even wider margin. Finally, the article concludes that the costs to the participants and the public of correcting improvident legislation can be great.

II. Oregon's Land Use System - Structure

In 1973, the Oregon legislature enacted Senate Bill 100. That bill established a new state agency, the Land Conservation and Development Commission ("LCDC")[6] as the center of the Oregon planning program.[7] LCDC had authority to hire the Director of a new state agency, the Department of Land Conservation and Development ("DLCD") and to adopt planning "goals,"[8] as well as administrative rules setting forth that the goals serve as guideposts for incorporation into regional and local comprehensive plans and land use regulations, although LCDC had the power to impose those goals and rules

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[6] OR. REV. STAT. §197.030 (1973) (establishing a seven member commission appointed by the governor subject to confirmation by the Senate).

[7] Much of this history as well as a review of the Oregon land use system is summarized from Edward Sullivan, *Year Zero*, note 1 *supra,* at 134.

[8] OR. REV. STAT. § 197.015(8) (2007).

directly and to require regional and local governments to enforce them.[9] LCDC also supervised the activities of the DLCD in the day-to-day work of the planning program.[10]

Over its lifetime, LCDC promulgated nineteen statewide planning goals. These goals establish binding land use policies that broadly deal with development and conservation. The goals fall generally into five categories: 1) citizen involvement, 2) the planning process, 3) conservation and natural resources, 4) economic development, including housing and transportation, and 5) management of specific areas, including the Willamette River Greenway and Oregon's coastal resources.[11] Since 1973, Oregon has required that most land use decisions by state agencies, general purpose local governments,[12] and other local governments[13] be consistent with state policy as embodied in this framework of planning goals and comprehensive plans. The goals may form an independent basis for challenging local planning actions in certain situations, such as in amendments to comprehensive plans and land use regulations.[14]

Senate Bill 100 required every city and county to formulate or amend its own comprehensive plan and land use regulations to meet the applicable planning goals. After review and analysis by DLCD, LCDC would decide whether to "acknowledge" those plans and regulations as complying with the statewide goals. Through acknowledgement

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[9] OR. REV. STAT. § 197.250 (2007).

[10] OR. REV. STAT. § 197.040(1)(a) (2007).

[11] DLCD, Statewide Planning Goals, http://www.oregon.gov/LCD/goals.shtml#Statewide_Planning_Goals (last visited December 28, 2009).

[12] In Oregon, cities and counties constitute general purpose local governments, as they have powers to deal with quasi-criminal, land use, nuisance and other functions associated with local governments, as opposed to being limited in the scope of those activities such as special districts.

[13] OR. REV. STAT. § 197.040(1)(a); § 197.180 (state agencies); § 197.175(1) (cities and counties, the general-purpose local governments of Oregon); § 197.015(19) (special districts) (2007).

[14] OR. REV. STAT. § 197.040(1)(a); § 197.180(9) (state agencies); § 197.175(1), (2)(c) (cities and counties, the general-purpose local governments of Oregon); § 197.015(19) (special districts) (2007).

LCDC certifies that the goals are implemented by local plans and regulations and once a plan is acknowledged the goals "drop out" and are no longer independent standards for review of local land use decisions.[15] By 1986, LCDC had acknowledged coordinated plans of all 276 cities and counties in the state.[16] Amendments to acknowledged plans and regulations are subject to appeal for failing to meet the goals.[17] Additionally, plans and land use regulations may sometimes be subject to a periodic review to determine continued compliance of local plans and land use regulations with the goals.[18]

In 1979, the Oregon Legislature created the Land Use Board of Appeals (LUBA).[19] This statewide administrative panel is unique in possessing "exclusive jurisdiction" to review most regional, local, and some state "land use decisions"[20] for conformity with the statewide planning goals.[21] The Board reviews amendments to acknowledged comprehensive plans and regulations for compliance with the goals. The Board also reviews the grant or denial of land use permits for conformity with local plans and regulations. Decisions of the Board are subject to review by the appellate courts.[22] Oregon's pioneering decision to supplant the trial court system of adjudication in the land

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15 OR. REV. STAT. § 197.040(1)(a); § 197.180(9) (state agencies); § 197.175(1), (2)(c) (cities and counties, the general-purpose local governments of Oregon); § 197.015(19) (special districts); § 197.251 (2007).

16 DLCD, 25th Anniversary of Senate Bill 100, http://www.oregon.gov/LCD/docs/history/25thanniv.pdf (last visited December 28, 2009). LCDC acknowledged comprehensive plans for Granite and Grant County on August 7, 1986. *See also* Edward Sullivan, *Remarks to University of Oregon's Symposium Marking the Twenty-Fifth Anniversary of S.B. 100*, 77 Oregon Law Review 3 (1998).

17 OR. REV. STAT. § 197.610, § 197.620 (2007).

18 OR. REV. STAT. § 197.610-.625, § 197.628 (2007).

19 S.B. 435, 60th Leg., Reg. Sess. (Or. 1979).

20 OR. REV. STAT. § 197.015 (2007).

21 OR. REV. STAT. § 197.620 (2007).

22 OR. REV. STAT. § 197.850 (2007).

use context was underpinned by sound policy reasons, including short decisional timelines, exclusive jurisdiction over all land-use decisions, the efficiencies resulting from strict procedural rules and the concomitant reduction of costs, the expertise that the Board has manifestly developed, and the resulting accuracy and consistency of decisions.[23] LUBA has had a significant role in shaping state policy because, in reviewing a challenged land use decision, it must interpret and apply the Oregon land use laws and rules, as well as the statewide planning goals.[24]

Notwithstanding the advent of state coordinated planning, land use restrictions were not universally welcomed, particularly in rural areas where the sale of small parcels for residential uses were greatly restricted.[25] As a result, there was an underlying resentment of land use regulations that eventually manifested itself in the use of the initiative process to pass Measure 37.

III. Measure 37

Oregon voters passed Measure 37 on November 2, 2004, and it became effective on December 2, 2004.[26] In brief, the Measure required either payment[27] for "lost value"

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[23] Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program, 1979-1999*, 36 Willamette L. Rev. 441, 446 (2000).

[24] *Id.*

[25] *See* Edward Sullivan, *Year Zero*, note 1 *supra,* at 131. Given the frequent inability of the governor and legislature to agree on land use legislation, incremental changes to administrative rules have resulted in the 80-acre minimum in Exclusive Farm Use zones combined with a requirement that farm uses produce a minimum of $80,000 in annual income in order to develop condition uses on agricultural land. *See also* OR. ADMIN. R. 660-033-0100(1) (2007) and OR. ADMIN. R. 660-033-0130(24) (2007).

[26] Act of December 2, 2004, ch. 1, 2005 Or. Laws 1, 2.

[27] Although Measure 37 used the words "just compensation" in its provisions, this term tends to be conflated with the use of that term in eminent domain law. Indeed, nothing is constitutionally "lost" by land-use regulation short of a deprivation of all economic value.

of real property due to land use regulations or, alternatively, waiver of land use regulations enacted after acquisition of the property by the "present owner."[28]

A. "Just Compensation"

Measure 37 created a general statutory (as opposed to constitutional) right to government payment when the State of Oregon or a local or regional government "enacts or enforces" a "land use regulation"[29] that restricts the use of property and reduces its value. Payment is measured as the reduction in value caused by a land use regulation from the time the current owner, the owner's family member, or entity acquired the property at issue to the present time.[30]

However, the real import of Measure 37 was found in the alternative to payment, i.e., waiver of the offending regulations. In contrast to monetary payment, a waiver applied only so as to allow the present owner to carry out a use of the property that was permitted at the time that owner acquired the property.[31] Almost all the claims that were granted resulted in a waiver rather than payment.

B. The Timber Industry's Special Interest in Measure 37

What may not have been realized at the time of the passage of Measure 37 was the significant investment in the Measure 37 campaign by certain businesses. These

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[28] OR. REV. STAT. § 197.352(8) (2005). *See also* Edward Sullivan, *Year Zero*, note 1 *supra.*

[29] OR. REV. STAT. § 197.352(1) (2005). Although the term includes state and local planning and zoning regulations, it also specifically includes transportation ordinances and forestry regulations. OR. REV. STAT. § 197.352(11)(B) (2005). The inclusion of the latter was not surprising in light of the significant campaign funds provided by timber companies, as discussed in Section III (B) and (C) *infra*.

[30] OR. REV. STAT. § 197.352(2) (2005). The drafters of the Measure learned from the California property-tax limitation measure, Proposition 13 (1978), by which property assessment was virtually "frozen" but could be reassessed when it changed hands. This approach makes single family housing more vulnerable to increased taxes. This is because Americans change homes relatively frequently, while corporate property retained an artificially low rate because it almost never "changed hands," largely due to stock sales, mergers, or other transactions that do not result in a new entity taking title. *See also* Edward Sullivan, *Year Zero*, note 1 *supra,* at 131-139.

[31] OR. REV. STAT. § 197.352(4) (2005).

businesses made a shrewd business decision that had the potential to result in large gains from the claims for compensation under Measure 37. These proponents made political inroads with voters by funding their appeal to voters with the image of Dorothy English[32] who, like other Oregonians, was subject to the increased stringency of rural regulation under Oregon's land use system.[33] The campaign did not address the windfall profits likely to result to timber interests who had bought and held land for significant periods of time.

C. Timber Industry Contributions to Proponents of Measure 37

Oregonians in Action (OIA), a public interest group associated with property rights interests, and its affiliates and allies including several political action committees (PACs) such as the Oregon Family Farm Association, and other organizations coordinated the efforts to pass Measure 37. The leadership of the OIA is connected to the timber industry. Frank Nims, a timber and farmland owner in Sherwood is a public face for OIA as well as Dale Riddle, of Seneca Jones Sawmill, based in Eugene.[34]

By April 19, 2007, the nonprofit group, Money in Politics Research Action Project (MiPRAP)[35], released a report analyzing campaign contributions in support of

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[32] Dorothy English was the prime symbol of the Measure 37 campaign. Ms. English now deceased but at the time of the Measure 37 campaign a 92-year-old woman, used her family's fight with Multnomah County to subdivide 22 acres the family had owned since 1953 as a focal point for gaining support of the electorate for Measure 37. *See* Dorothy English, face of Measure 37 campaign, dies, PORTLAND TRIBUNE, April 11, 2008 (on file with authors).

[33] *See* Case Study on Government Payment: English v. Multnomah County, in Section V(F) *infra.*

[34] Frank Nims has served as President of OIA and a volunteer since it was formed, appointed Chairman of the Board in 2005. See http://www.oia.org/index.php/about-us (last visited December 28, 2009). The Stop Taking Our Property committee formed in August 2007 with OIA president David Hunnicut serving as PAC treasurer. PAC director Dale Riddle works as an attorney for Seneca Sawmill Company, which gave 26 percent of the total funds raised by the Yes on Measure 37 effort. See Democracy Reform Group, Press Release, "Here We Go Again: What the Money Trail Tells Oregonians about Measure 49," July 31, 2007. (On file with authors).

[35] The Money in Politics Research Action Project has since merged with Common Cause Oregon.

Measure 37.[36] Contributors to the 2004 campaign to pass Measure 37 filed claims under the measure worth at least $600 million.[37] MiPRAP's review of Measure 37 campaign contributions included all 180 itemized donors to the signature gathering effort, and subsequent ballot measure campaigns, as well as those claims filed by close family members of individuals and officers of the businesses and organizations contributing to the Measure 37 campaign.[38] MiPRAP then compared the campaign supporters' contributions against the monetary value of the Measure 37 claims and calculated that the Measure 37 contributors, at the time of filing their Measure 37 claim and using their own estimates of "loss," stood to earn a median potential percentage gain on investment of 241,067 percent.[39]

The following Chart, reproduced with MiPRAP's permission, summarizes the potential gain sought by the timber industry through their Measure 37 claims:

Contributor Name(s)	Contribution to Measure 37 Campaign	Percentage of Measure 37 Contribution Total	Value of Measure 37 Claim(s)	Claimant(s) and Relationship(s)	Potential Percentage Gain on Investment
Seneca Jones Timber Co.	$321,000	19%	$6,750,000	Aaron U. Jones, Founder	2003%
ATR Services, Inc.,	$195,481	12%	$2,400,000	Greg Demers,	1128%

[36] See Money in Politics Research Action Project, Press Release "Donors Gave More than Half the Money to the Measure 37 Campaign File Over $600 Million in Claims, Could Earn Windfall on Campaign Investment," April 19, 2007.

[37] *Id.* However, this $600 million loss was a landowner's estimates and a number that was untested by the court system. It did not include an offset for tax credits versus diminution of value. *See generally* A. Plantinga and W.K. Jaeger, *"The Economics Behind Measure 37,"* Oregon State University Extension Service (2007) (on file with authors).

[38] *Id.*

[39] *Id.* As shown in the Table, potential percentage gain on investment shows the small risk in donating to the Yes on Measure 37 campaign while hoping for a remarkable amount of return. The large landholdings of the timber industry meant that Measure 37 claims for compensation on these lands could result in a major economic boost for these property owners if their Measure 37 compensation claims were approved as compared to the relatively small amount contributed to the campaign that would enable these property owners to seek such compensation.

Greg Demers and Frontier Resources, LLC				company owner, and Robert Demers, son	
Dr Johnson Lumber Co.	$75,000	4%	$890,000	Donald R. Johnson, President	1087%
Rosboro Lumber Co.	$35,000	2%	Unknown	Filed 3 claims – no dollar amount in DAS data	Unknown
Stimson Lumber Co.	$30,000	2%	$269,051,463	Stimson Lumber Company	896,738%
South Coast Lumber Co.	$25,000	1%	Unknown	Filed 12 claims – no dollar amount in DAS data	Unknown
Murphy Plywood	$25,000	1%	$900,000	Dollar amount in 1 of 3 claims	3500%
Guistina Land & Timber Co.	$20,000	1%	$1,510,000	Dollar amount in 1 of 3 claims	7450%
SDS Lumber Company	$7,500	0%	$120,750,000	SDS Lumber Company	1,609,900%
Davidson Industries, Inc.	$5,000	0%	$58,599,016	Dollar amounts in 16 of 34 claims	1,171,880%
Indian Hill, LLC	$5,000	0%	$7,100,000	Indian Hill, LLC	141,900%
Viastelicia, Jr., John	$100	0%	$2,820,000	Viastelicia, John J.	2,819,900%
Claimant Subtotal	$744,081	44%			
Other Contributor Subtotal	$1,107,,256	66%			
Total Contributions	$1,698,737	100%			

MiPRAP analysis of 2004 campaign finance reports filed with the Secretary of State and Measure 37 Claims compiled in the Department of Administrative Services claims registry dated April 12, 2007.

Timber interests provided 44% of the overall funding to Measure 37. Of the known Measure 37 claims filed, not one of the timber interests sought less than 1000% return on their dollar for dollar investment in the campaign. The contributor with the largest total claims found, Stimson Lumber Company, gave $30,000 to the campaign, and filed at least $269 million in Measure 37 claims.

Given these figures it is difficult to believe that Measure 37 was about individual property owners like Dorothy English. Instead, it is apparent from the result of Measure 37's passage and the claims made, that it was the big money interests of timber, invested in OIA and its various allied political action committees that had the largest stake in the outcome of the 2004 election.

D. Measure 37 Problems

The potential for significant chaotic development under Measure 37 became its greatest shortcoming. Not only were state, regional and local governments overrun with undocumented demands for large amounts of public funds and waiver requests, but the Measure 37 language was so broad in allowing the holder of "any interest in land" to bring a claim, that people who owned property as a result of inheritance could benefit from the historical absence of land use regulations by virtue of the property being held by one family (or, due to its artificial life or through merger or acquisition, by corporations or other artificial entities) over time.[40] The sheer amount of development that could have resulted from the waivers of land use regulations shocked the public, which had anticipated only minimal effects through creation of some rural homesites, not large subdivisions in some of the state's most important natural and agricultural resource areas, much less a proliferation of billboards and shopping centers. Moreover, because new claims could be filed with every new regulation and there was no statute of limitations on such claims, risk-avoiding public agencies were discouraged from ever adopting new plans and regulations that could be the source of new claims.[41]

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[40] OR. REV. STAT. §197.352(2) (2005).

[41] Edward Sullivan, *Year Zero*, note 1 *supra,* at 146.

During the nearly three-year life of Measure 37, many difficulties arose in its application. For example, the measure lacked a statute of limitations which meant that a claim could be brought at any time.[42] Public agencies had difficulty in applying Measure 37, with respect to identifying the land use regulations pertaining to a particular parcel, because many land use laws date back to the 1920s and that prior to 1969, most cities and counties did not have a centrally located set of land use regulations.[43] Significantly, Measure 37 effectively placed the burden of disproving a chain of title or proving the existence of long-repealed or modified land use regulations on the public agency and gave a one-way attorney fee right to landowners, all of which militated towards most local governments taking the "waiver" option to avoid payments of often-inflated claims and attorney fees.

From the perspective of Measure 37 proponents, the language also limited the benefit of a waiver of a land use regulation, as only the current owner held the benefit of the waiver. The land use regulation waiver was non-transferrable.[44] While Measure 37 proponents quickly realized public sentiment had turned a disfavoring eye towards the relief granted under Measure 37, they still maintained an important hand in shaping a resolution to the problem associated with already approved waivers, and pending waiver claims. As such, Measure 37 proponents looked for the best outcome in any solution, including a consideration of how to make waivers transferrable.

In recognition of these difficulties and shortfalls, the state legislature turned its attention to resolving the unbridled development and financial impacts faced by public

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[42] *Id.*

[43] *Id.* at 147.

[44] *Id.* At 146.

agencies as a result of the land use waivers or compensation claims filed under Measure 37. The gains provided to property owners under Measure 37 were so unrestricted as to greatly limit public oversight over land development.[45] However, the legislature also recognized the need to address some of the landowner concerns that led to the passage of Measure 37. As a result, the state's leaders, in conjunction with public and private interest groups, looked for a middle ground to provide for some development while preventing the massive subdivisions contemplated in granted and pending Measure 37 waivers. This compromise became the next initiative for voters to consider on land use, Measure 49.

IV. Measure 49

As of December 5, 2007, over 6,850 claims for government payment or waiver of land use regulations were filed in Oregon affecting more than 750,000 acres of land.[46] Some feared that, if all the Measure 37 claims were paid, the public would be bankrupt. Alternatively, if the amount of development allowed under Measure 37 waivers were realized, it would irreversibly and adversely change Oregon's landscape. In order to prevent these drastic results, the state legislature responded to these concerns and proposed Measure 49 for voter approval.

A. Measure 49 as Enacted

Measure 49 is prospective in that it applies only to unvested Measure 37 waivers, Measure 37 claims that have not been reduced to a final decision, or new claims filed

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[45] Measure 37 exempted "public health and safety" regulations and certain other restrictions from its scope and local governments could require that Measure 37 claims decided after a public hearing, even if not required. OR. REV. STAT. § 197.352(3) (2005). However, most land use requirements were subject to compensation or waiver.

[46] See http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml (last visited December 28, 2009). *See also* Sam Lowry, *Oregon Clips Measure 37's Wings*, American Planning Association 60 Planning and Environmental Law Journal 9 (January 2008).

after the date of enactment of Measure 49. Under Measure 49, the Governor appoints a Compensation and Conservation Ombudsman to work with DLCD and Measure 49 claimants to analyze problems of land use planning, real property law, and real estate valuation, and to help facilitate resolution of complex disputes.[47] The Ombudsman, among other duties, will help claimants understand the provisions of both Measures.[48]

Under Section 6 of Measure 49, if the subject property is located outside an urban growth boundary an eligible claimant may elect to limit the request to subdividing and building no more than three dwellings on three lots if such construction were allowed when the claimant acquired the property.[49] Those landowners who choose to apply for up to three homes need only show that they had a right to build the homes when the property was acquired.[50] No showing of reduction in fair market value is required in the latter case.

For lands outside an urban growth boundary as well as lands that are not located on high value farmland, forestland or in ground-water restricted areas, Section 7 of Measure 49 allows that a claimant may seek subdivision and development approval to build not more than 10 dwelling units.[51] In addition to showing that land use regulations restricted the construction of 10 dwellings when the property was acquired, a claimant must also establish that the regulations have resulted in reduction in the fair market value of the property based on the value one year before the enactment of the land use

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47 OR. REV. STAT. § 195.320 (2007).

48 OR. REV. STAT. § 195.322 (2007).

49 Act of June 15, 2007, ch. 424, § 6(2)(b), 2007 Or. Laws 1138, 1142.

50 Act of June 15, 2007, ch. 424, § 6(6)(f), 2007 Or. Laws 1138, 1143.

51 Act of June 15, 2007, ch. 424, § 7(1), 2007 Or. Laws 1138, 1143.

regulation against one year after enactment plus interest.[52] An appraisal is required to establish reduction in value.[53]

The establishment of a dwelling under Measure 49 will be authorized when a claimant can establish the use was allowed when the property was acquired.[54] Current site development standards cannot be interpreted to prohibit the establishment of the dwelling authorized under Measure 49.[55] Outside Urban Growth Boundaries, a claimant must show compliance with a statute requiring owners to sign and record a deed restriction waiving any cause of action for injuries caused by farming or forest practices.[56] Maximum lot sizes for high-value farm, forestlands, or groundwater-restricted areas may not exceed two acres.[57] For non-high-value farmland, forestlands or groundwater-restricted areas, the maximum lot size is five acres.[58] Lots are to be clustered so as to maximize the remaining lot for farm and forest use.[59]

Claimants owning property located within an Urban Growth Boundary are permitted (i) up to the number of single family dwellings described in a Measure 37 waiver issued by Metro, a city, or county; or (ii) a maximum of ten (10) single family dwellings; or (iii) the number of single family dwellings the total value of which represents just compensation for the reduction in fair market value caused by the

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52 Act of June 15, 2007, ch. 424, § 7(5)(g), 2007 Or. Laws 1138, 1143.

53 Act of June 15, 2007, ch. 424, § 7(7), 2007 Or. Laws 1138, 1144.

54 OR. REV. STAT. § 195.310(5) (2007).

55 Act of June 15, 2007, ch. 424, § 11(1), 2007 Or. Laws 1138, 1147.

56 OR. REV. STAT. § 215.293 (2007).

57 Act of June 15, 2007, ch. 424, § 11(3)(a), 2007 Or. Laws 1138, 1148.

58 *Id.*

59 *Id.*

enactment of a land use regulation since the owner's acquisition date.[60] If the claimant chooses to obtain relief based on the number of single family dwellings the total value of which represents just compensation for the reduction in fair market value caused by the enactment of a land use regulation since the owner's acquisition date, the claimant must provide evidence to support the claim.[61] This evidence must include the fair market value of the property from the date that is one year before the enactment of the land use regulation to the date that is one year after the enactment.[62] The fair market value must be determined by an appraisal prepared by a certified appraiser and must contain the highest and best use of the property at the time the land use regulation was enacted.[63]

There still lies the question of those claimants who had pursued development or predevelopment activities pursuant to their Measure 37 waivers. Under Measure 49, the only Measure 37 waivers with continuing validity are those waivers where the claimant has a common law vested right to complete and continue the use described in the waiver as of December 6, 2007, the effective date of Measure 49.[64] The determination of a common law vested right in Measure 37 waivers is the subject of ongoing litigation and will be discussed in greater detail below.

Waivers granted under Measure 49 run with the property and are transferable.[65] This transferability allows a landowner who obtains a waiver to sell the land with the

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[60] Act of June 15, 2007, ch. 424, § 9(2), 2007 Or. Laws 1138, 1145.

[61] Act of June 15, 2007, ch. 424, §§ 9(6), 9(7) 2007 Or. Laws 1138, 1146.

[62] Act of June 15, 2007, ch. 424, § 9(6), 2007 Or. Laws 1138, 1146. Review § 9(6) carefully to gain an understanding in situations where the claimant complains that multiple land use regulations caused a reduction in the fair market value of the property.

[63] Act of June 15, 2007, ch. 424, § 9(7), 2007 Or. Laws 1138, 1146.

[64] Act of June 15, 2007, ch. 424, § 5(3), 2007 Or. Laws 1138, 1142.

[65] Act of June 15, 2007, ch. 424, § 11(6), 2007 Or. Laws 1138, 1148.

rights to develop granted under the waiver. However, once a waiver is purchased, the new owner must create the lots or parcels and establish dwellings within 10 years of the purchase.[66]

Measure 49 also limited the extent to which owners could file post-Measure 37 claims for the enactment of new regulations. Any claim filed after June 28, 2007 for a regulation enacted after January 1, 2007[67] is limited only to agricultural and residential uses. As a result the regulatory authority for commercial and industrial uses was restored – government no longer had to "pay as you go" in exercising its police power for uses other than agricultural and residential. As with Measure 37, enactment of land use regulations must restrict the use and reduce the fair market value of the property.[68] Compensation or waiver is similarly available for purposes of offsetting the reduction in value.[69]

Measure 49 provided the state with a reasonable method to provide some relief from land use restrictions consistent with the stated purpose of Measure 37 while avoiding the impacts from intense development of farm and forest lands. The Measure attempted to balance the voters' intent under Measure 37 by assuring fairness to individuals like Dorothy English without inadvertently opening up prime farm and forest land to sprawl or intense development.

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[66] *Id.*

[67] OR. ADMIN. R. 660-041-0510(8) and OR. ADMIN. R. 660-041-0530 (2007), governing the procedures for New Land Use Regulations enacted after June 28, 2007.

[68] OR. REV. STAT. § 195.310 (2007).

[69] OR. REV. STAT. § 195.310(5) (2007). This provision would enable the government to avoid a monetary payment by granting the claimant a certain number of lots to the extent necessary to offset the reduction in the fair market value of the property. The administrative rules governing the application of this provision require an appraisal for determining the reduction in fair market value. OR. ADMIN. R. 660-041-0520(4)(h) (2007). However, no administrative rule requires an appraisal of the value of the lots used as an offset to compensation.

B. Timber Industry Role in Measure 49 Campaign

An additional untold story is the covert effort of the timber industry to improve its position regardless of the outcome of the Measure 49 vote. If the initiative process were completely transparent in that election, then the true spokes models would have been certain developers and timber companies. The timber industry, whose public presence in Oregon seems to be peripheral - from beauty strips along clear cuts to major funding participants of Measure 37 hidden in the depths of campaign contribution filings, positioned itself to reap the most rewards from Measure 49 through agreement to remain silent for the most part during the Measure 49 election cycle. As discussed below, the timber industry continued to exercise its influence over the state legislature ensuring passage of Senate Bill 691.

A complete analysis of Measure 49 requires a review of the timber industry's decision not to oppose the referendum as an industry and to consider what it got in return for the tacit agreement to allow Measure 49 to replace the more lucrative Measure 37 remedies.

As a result of the volume of claims and the possible repercussions of approving the 7,500 requested waivers, or in the alternative potential compensation payments to these claimants, Oregon voters overwhelmingly moved to address some of the problems associated with Measure 37. Oregonians voted to pass Measure 49 with 62% voting in favor to 38% opposed.[70]

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[70] See http://oregonvotes.org/nov62007/abstract/results.pdf. (last visited December 28, 2009). Measure 37 passed by a margin of 60.62% in favor and 39.38% opposed. See http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf (last visited December 28, 2009). One effective tactic used by Measure 49 opponents was the use of maps and other campaign materials showing the vast number of acres for which Measure 37 claims had been filed. These materials not only showed rural lands affected, but also brought home the claims made in urban and suburban areas for intense urban

In a compromise with the state legislators and environmental groups, the timber interests as an organized group remained mostly silent during the Measure 49 election cycle, though some individual members and executives opposed the measure. The Yes on 49 Committee raised a total of $4,880,917 to support the initiative, double the contributions to the No on 49 Committee which was comprised of Fix Measure 49, OIA PAC, and Stop Taking Our Property groups, and raised a total of $2,465,713.[71]

Not surprisingly, 5 of the top 10 contributors to the No on 49 Campaign matched the same timber interests with pending claims for compensation under Measure 37.[72] The top contributor was Stimson Lumber, which contributed $495,000 to the No on Measure 49 campaign. With the value of claims pending for Stimson Lumber amounting to $269,051,463, it may be surprising that the company did not contribute more to the campaign. From the outset it was clear that being outspent by the Yes on 49 Campaign by a 2:1 margin would likely result in the enactment of Measure 49. It is not surprising that the timber industry planned for this eventuality.

Measure 49 struck a balance by providing some relief to property owners from restrictive land use regulations while limiting the impact of intense development on prime farm and forest lands. Oregonians also voted on specific rules relating to forest land when they approved Measure 49. Nonetheless, modifications to Measure 49 regarding forest lands were approved by the Legislature in June 2009 through Senate Bill 691.[73]

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uses and billboards which Measure 37 would have permitted. See Alex Potapov, *"Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 3939 ENVTL. L. R. 10516, 10524 (2009).

[71] See Democracy Reform Group, Press Release, "Measure Campaigns Raise Nearly $20 per Vote Case Fundraising Underdogs Lose in Latest Round of Ballot Measures," November 14, 2007. (On file with authors).

[72] *Id.*

[73] Discussed in greater detail in the Post-Measure 49 Legislation section *infra*.

C. Post-Measure 49 Legislation

With Senate Bill 691, the Oregon Forest Industries Council (OFIC), representing the largest forest products manufacturing-related firms in the state, collected on its side of the Measure 49 bargain. In return for sitting out the Ballot Measure 49 "fix" to Measure 37, OFIC secured agreement from conservation groups and public agencies alike to support, or at least not oppose, a special forestry exception that broadens the scope of government payment under Measure 49, only as it relates to forest practices. One interesting aspect of the legislature's consideration of Senate Bill 691 was the deafening silence of what would be the expected opposition to this bill. Shielded from publicity, Senate Bill 691 passed the Senate by a 29 to 1 margin, and unanimously passed the House with 60 votes and was signed by the Governor.[74]

Senate Bill 691 carves out special privileges and remedies for forest land owners that Oregonians did not see fit to include in 2007 when the legislature presented voters with Measure 49. In 2007 Measure 49 was marketed to voters with a goal of providing a better balance of fairness for claimants and surrounding property owners, as well as protection of prime farm and forest land and water sensitive areas.

Instead of referring the matter to a vote as with Measure 49, the legislators adopted Senate Bill 691 with a minimum of discussion and no referral. Senate Bill 691 broadened the scope of "compensation" authorized by Measure 49 in the following ways:

- Expanding the types of regulations that can give rise to a claim for compensation for forest land to include ballot measures or other regulations enacted to protect natural resources;
- Permitting a different method of appraisal to determine reduction in value "in accordance with generally accepted forest industry practices" rather than the very

[74] See http://gov.oregonlive.com/bill/SB691/. (Last visited December 28, 2009).

specific method prescribed in Measure 49 to determine market value for all other claims;

- Allowing future owners to file a claim, and not just current owners, as is provided in Measure 49; and

- Allowing future owners to reap the rewards of a successful claim by the current owner, in other words SB 691 allows transferability of relief.[75]

Many of these provisions may seem rather benign and modest; after all, waivers of land use regulations granted under Measure 49 are transferable. What is not at all clear is why the Legislature saw fit in the first instance to provide these additional privileges. After all, it was forest industry money that funded the Measure 37 campaign in the first place and it was the overreaching of that industry in filing Measure 37 claims that generated much of the support for Measure 49.

The purpose for the adoption of Measure 37 and the "fix" of Measure 49 was to give value to the expectation of the individual landowner being able to build residences on discrete parcels. It was not to provide an insurance policy to large forest producers that no future salmon or forest protection measures will be imposed without concurrently providing for waiver or payment of compensation. This legislation grants a right to be "compensated" for the protection of public resources that timber companies have no right to in the first place.

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[75] *See generally* Enrolled Senate Bill 691, Reg. Sess. (Or. 2009) and text at http://www.leg.state.or.us/09reg/measures/sb0600.dir/sb0691.en.html. (Last visited December 28, 2009). For example, OR. REV. STAT. § 195.310(4) (2009) is revised to account for reduction in fair market value lost by land use regulations enacted on timber land by providing appraisals showing the value of the land and harvestable timber, with and without application of the land use regulation conducted in accordance with generally accepted forest industry practices for determining the value of timberland. These special rules for valuation of timberland suggest that the compensation will likely be more liberal for timber interests than for other just compensation claimants under OR. REV. STAT § 195.310(2) (2009) that limits the amount a claimant can spend on appraisals.

Although Senate Bill 691 does not limit health and safety measures from being implemented on forestland, it completely undermines the transparency that the Legislature sought in submitting Measure 49 to a vote of the people.[76] This legislation restricts the authority of the Department of Forestry. Thus, those concerned with protecting the environment and promoting sustainable forestry seeking to increase stream buffers or provide wildlife corridors by limiting clear cutting will be disappointed. Because the effective date of SB 691 is January 1, 2010, no claims involving forest land under that legislation have been decided by the courts.[77]

In addition to SB 691, the legislature also passed House Bill 3225 ("HB 3225") which allows some claimants who did not timely file under the original Measure 49 deadlines to extend their Measure 49 Election time period to December 31, 2009.[78] HB 3225 allowed for special consideration of claims for property owners whose property straddled an urban growth boundar, or fell inside a city limit but outside of the urban growth boundary.[79] Further, HB 3225 requires the DLCD (assigned to the Measure 49 Ombudsman) to investigate why claimants failed to file appraisals in support of their Section 7, Measure 49 Election.[80] Many claimants were unable to file appraisals because such work could not be timely completed or completed for less than $5,000.[81] For the no appraisal claims, HB 3225 only provides for the research to determine how many claims

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[76] *Id*. and *see* OR. REV. STAT. §§ 195.300- 195.312 (2009).

[77] Enrolled Senate Bill 691, §§ 4 – 5a, Reg. Sess. (Or. 2009).

[78] See Enrolled House Bill 3225-B, § 3, Reg. Sess. (Or. 2009).

[79] See Enrolled House Bill 3225-B, §§ 4 – 5a, Reg. Sess. (Or. 2009).

[80] Interview with Carmel Bender Charland, Compensation & Conservation Ombudsman, DLCD in Portland, Or. (October 21, 2009). The majority of conditional claimants did not file an appraisal or change their election because they did not understand what was required or the consequences of not acting. Of the responses reviewed by the Ombudsman, 18% were unable to find an appraiser and/or afford one once they did. Another 59% of the responses fell into the "generally did not understand" category.

[81] *Id.*

are in this situation and why, in order for the Legislature to consider possible further amendment to Measure 49.[82] HB 3225 extended the original election filing which allowed claims filed up to thirty (30) days late, but otherwise eligible, to now receive Measure 49 supplemental review; and it provides a hardship exception that allows a limited number of claims to be processed out of order when a hardship has been demonstrated.[83]

Based on this legislative framework, the difficult task of interpreting the nuanced details of Measure 49 is under way in every subsequent level of review.

V. Measure 49 Litigation

The first cases decided under Measure 49 resolved the issue of jurisdiction to hear pending appeals over Measure 37 determinations, as well as matters arising out of the new legislation. Primarily, LUBA and the Oregon Court of Appeals were required to analyze whether Measure 49 involved "land use decisions," over which LUBA has exclusive statutory jurisdiction,[84] or whether the legislation required the courts to hear these cases. As discussed below, the legislation specifically provided for such jurisdiction to be in the courts, rather than LUBA.

With jurisdiction lying in the court system, the next most important legal question for many property owners with approved Measure 37 waivers would be whether actions taken in reliance on those waivers would "vest" a right to continue construction or recognize the use under Measure 49's common law vested rights requirement, and how

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82 *Id.*

83 *Id.*

84 OR. REV. STAT. § 197.825(1) (2007).

the courts will address the issue. The resolution of the vested rights cases would have permanent effects on the state's physical landscape.

Further, Measure 49 litigation involved a different ownership definition from that used in Measure 37, and the application of various land use process statutes. Another significant case involved an unexpected victory for Measure 37 claimants in federal court, which case is now before the Ninth Circuit Court of Appeals. Then there was the unique Dorothy English case and the lessons to be learned by public agencies regarding litigation strategy.

The final portion of this section involves a closer look at administrative activity to date in the implementation of Measure 49 and litigation arising out of such activity. The question of how judicial review will treat those instances where DLCD changed its position from its decisions to award Measure 37 waivers to its denial of Measure 49 claims will be of interest to claimants who no doubt expect their waivers to be approved subject to the new limitations on dwellings under Measure 49.

A. Jurisdiction

The first question the courts faced following the passage of Measure 49 was the status of pending appeals of Measure 37 claims. The statutory language of Measure 49 explicitly provided that its provisions superseded any Measure 37 review or remedy, except with respect to vested rights claims.[85] The courts interpreted Measure 49 to require a fresh look at any non-vested Measure 37 claim solely through the Measure 49 remedy process.

[85] Act of June 15, 2007, ch. 424, § 5, 2007 Or. Laws 1138, 1142.

The Oregon Supreme Court decision in *Corey v. DLCD*[86] was perhaps the most important pronouncement of that court dealing with the application of Measure 49 to Measure 37 claims. Petitioner owned a 23-acre parcel in rural Clackamas County.[87] DLCD issued an order under Measure 37 in 2005 waiving Goals 3 (Agricultural lands) and 14 (Urbanization).[88] Petitioner then appealed the waiver believing that additional land use regulations should have been waived.[89] Thereafter, jurisdictional questions arose over which court should have heard the matter.[90] The case was pending when Measure 49 was enacted by the voters.[91]

Petitioner argued that DLCD's Measure 37 decision resulted in a waiver that became a constitutionally protected property right that was vested.[92] The court disagreed, finding that the waiver alone was not sufficient to constitute a "common law vested right," under Measure 49.[93] Petitioner made no claim that she had partially completed any use described in the Measure 37 waiver she had received.[94] The court concluded:

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[86] Corey v. DLCD, 184 P.3d 1109 (Or. 2008).

[87] *Id,* at 1110-1111. Petitioner owned the property in part with her sister and had formed the Bergis Road, LLC. For simplicity, this article refers to "Petitioner" or "Corey" as encompassing all the individuals and entities with ownership interest in the property.

[88] *Id.*

[89] *Id.* at 1111.

[90] In a prior proceeding, DLCD claimed that the case should have been heard by the Circuit Court instead of the Court of Appeals under the Oregon Administrative Procedures Act OR. REV. STAT. § 183.484 (2007) as an order in other than a contested case. However, the Court of Appeals ruled that it had jurisdiction under OR. REV. STAT. § 183.482 (2007), because the proceedings should have been conducted as a contested case. DLCD appealed that decision to the Oregon Supreme Court. The Oregon Supreme Court would have ruled on the jurisdiction question, had Measure 49 not mooted the case. *Id.* at 1111-1112.

[91] *Id.* at 1112.

[92] *Id.* at 1113. As noted in Section V(D) below, a similar claim would resonate more effectively with at least one lower federal court in a case now on appeal. *See* Citizens for Constitutional Fairness v. Jackson County, Civ. No. 08-3015-PA, 2008 WL 4890585, at *1 (D. Or. November 12, 2008).

[93] *Id.* See also Act of June 15, 2007, ch. 424, § 5(3), 2007 Or. Laws 1138, 1142.

[94] Corey v. DLCD, note 86 *supra,* at 1114.

> In fact, Measure 49 by its terms deprives Measure 37 waivers – and *all* other orders disposing of Measure 37 claims – of any continuing viability, with a single exception that does not apply to plaintiff's claim [common law vested right]. Thus, after December 6, 2007 (the effective date of Measure 49), the final order at issue in the present case had no legal effect. * * * The case is moot. (Emphasis in original).[95]

In *Frank v. DLCD*,[96] another Measure 37 case pending when Measure 49 was enacted, the owner of a 225-acre parcel outside an urban growth boundary and zoned for exclusive farm use in rural Marion County obtained a Measure 37 waiver to subdivide her property into smaller lots for residential uses. Petitioner appealed the scope of the Measure 37 waiver claiming it was insufficient.[97]

The Court of Appeals concluded that enactment of Measure 49 limits the scope of remedies available to Petitioner.[98] The court found that, in the absence of a vested right, the new administrative process under Measure 49 allows a qualified claimant either up to three home sites, or up to ten home sites on property under Section 6 or 7 of Measure 49, respectively.[99] The court concluded the new remedies replaced the Measure 37 waiver and as a result the pending litigation was no longer justiciable.[100]

These cases make clear that Measure 49 rendered outstanding Measure 37 waivers void and that any litigation regarding the scope of relief provided under those waivers was moot with the sole exception of vested rights litigation. Any relief under existing Measure 37 waivers must commence with a claim under the new standards provided under Measure 49.

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95 *Id.*

96 Frank v. DLCD, 176 P.3d 411, 412 (Or. App. 2008).

97 *Id*.

98 *Id.* at 413.

99 *Id*. at 414.

100 *Id.* at 414 -415.

B. Vested Rights under Measure 37

Property owners who obtained a valid Measure 37 waiver and can establish a common law vested right to the use authorized by the waiver are not required to go through the new process under Measure 49.[101] Given the more limited relief available under Measure 49, compared to that under Measure 37, this is a more attractive alternative for many claimants.

A common law vested right is the right to complete a partially improved development that is rendered unlawful by subsequently enacted regulation.[102] Most of the existing vested rights case law is based on appeals from trial court decisions during the 1970s prior to the inception of both LUBA and the enactment of the "goal post rule." The "goal post rule"[103] is a statutory vesting rule that requires any decision be based on the rules in place at the time the application is filed, essentially barring local government from legislating a different result for a pending application. Generally, a local government's determination over whether a landowner has a common law vested right is a land use decision over which LUBA has jurisdiction.[104] Since the inception of LUBA and the "goal post rule" vested rights cases are less common and generally are not litigated in circuit court but are instead subject to the exclusive jurisdiction of LUBA, as they concern the application of land use regulations and otherwise fall within the

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[101] Act of June 15, 2007, ch. 424, § 5(3), 2007 Or. Laws 1138, 1142.

[102] Friends of Yamhill County v. Yamhill County, 57 Or. LUBA 1, 2 (2008); and *see also* Alto v. City of Cannon Beach, 57 Or. LUBA 739 (2008).

[103] OR. REV. STAT. § 215.427(3)(a) (2007).

[104] *Id.* which requires a decision "based upon the standards and criteria that were applicable at the time the application was first submitted." This statutory vesting prohibits in most cases the enactment of subsequent regulations that would preclude development of the project.

definition of a land use decision.[105] Section 5(3) of Measure 49 excludes vested rights decisions on Measure 37 claims from LUBA's jurisdiction and arguably shifts review of public agency decisions from LUBA to the trial courts.[106]

The first case to address the jurisdictional question was *Friends of Yamhill County v. Yamhill County,* in which LUBA considered whether a county's vested rights determination for a subdivision pursuant to Measure 37 waivers was subject to review by LUBA or was a determination made "under section 5(3)" of Measure 49 and reviewed by the circuit court.[107]

Section 5 of Measure 49 provides:

> A claimant that filed a claim under ORS 197.352 [renumbered 195.305] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly [June 28, 2007] is entitled to just compensation as provided in:
>
> (1) Section 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;
>
> (2) Section 9 of this 2007 Act if the property described in the claim is located, in whole or in part, within an urban growth boundary; or
>
> (3) A waiver issued before the effective date of this 2007 Act [December 6, 2007] 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.[108]

Meanwhile state law in turn provides that:

> A decision by the public entity that an owner qualifies for just compensation <u>under</u> ORS 195.305 to 195.336 and <u>sections 5 to 11</u> [of measure 49] and a

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105 Forman v. Clatsop County, 681 P.2d 786, 788 (Or. 1984).

106 Act of June 15, 2007, ch. 424, § 16, 2007 Or. Laws 1138, 1151.

107 Friends of Yamhill County v. Yamhill County, note 102 *supra*. *See also* DLCD v. Clatsop County, __ Or. LUBA __ , LUBA No. 2008-176/178 (2009).

108 *Id.* at 3-4.

> decision by a public entity on the nature and extent of that compensation <u>are not land use decisions</u>. (Emphasis added).[109]

LUBA set forth Petitioner's argument for its jurisdiction as follows:

> According to petitioner, section 5 lists three potential ways to obtain just compensation. Petitioner argues that section 5, subsections (1) and (2) both direct property owners to other parts of Measure 49 to obtain just compensation: sections 6 or 7 for properties outside UGBs or section 9 for properties inside UGBs. Under petitioner's view, the just compensation is thus not obtained "under section 5" but "under" sections 6, 7, or 9. According to petitioner, the language in section 5 subsection (3) provides that just compensation is available under a "common law vested right" theory. We understand petitioner to take the position that such relief is not provided "under" section 5 - it is instead provided "under" the vested right itself. Therefore, according to petitioner, vested rights determinations are not just compensation provided "under" section 5 of Measure 49.[110]

LUBA read Measure 49 to provide that a local government's vested rights determination is not a land use decision subject to its jurisdiction.[111] LUBA explicitly determined that a vested rights determination based on a Measure 37 waiver is provided "under section 5" and therefore is not a land use decision subject to its jurisdiction.[112] Based on Petitioner's conditional motion, LUBA transferred the case to Yamhill County Circuit Court.[113]

In *Cyrus v. Board of County Commissioners of Deschutes County*, the question of whether a public entity, Central Electric Cooperative (CEC), established a vested right under Measure 37 waiver was determined moot with the passage of Measure 49.[114] At the time of the appeal, CEC had already constructed a power line on the easement at issue

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109 OR. REV. STAT. § 195.305(7) (2007).

110 Friends of Yamhill County v. Yamhill County, note 102 *supra,* at 5.

111 *Id.*

112 *Id.* at 6.

113 *Id*. at 7.

114 Cyrus v. Board of Commissioners of Deschutes County, 202 P.3d 274, 275 (Or.App. 2009).

under a valid Measure 37 waiver.[115] The Court did not address CEC's further claim that it had a valid vested right, but based on *Corey* the court nonetheless dismissed the case as moot.[116] The court concluded that any determination of a vested right claim must first be decided under Section 5(3) of Measure 49. Any appeal of a vested rights determination by local government under Measure 49 is to circuit court and not to LUBA.[117]

These cases demonstrate that jurisdiction over determination of vested rights status of Measure 37 claims rests with the courts and not LUBA. Yet the scope of the "common law vested right" exemption in Measure 49 raises several important questions:

1. Alternatives Analyses of Vested Rights

There are no Oregon appellate decisions regarding the existence of a common law vested right in the context of a Measure 37 waiver. However, the concurring opinion of Judge Sercombe in *Cyrus*[118] sets out two primary concerns in the consideration of a common law vesting claim involving a Measure 37 waiver. First, the courts continue to look to the "*Holmes*" factors[119] and the interpretation of those factors in subsequent cases to determine whether the claimant has a vested right.[120] Second, within the *Holmes* framework, the courts will, in addition to the ratio of qualified expenditures relative to the cost of the project, likely give particular attention to the good faith of the property owner

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115 *Id.*

116 *Id.*, at 277.

117 *Id.*, at 278. Many local governments have adopted a vested rights process. Hoffman v. Jefferson County, __ Or. LUBA __, LUBA No. 2008-090 (2009), and s*ee also* for example, Yamhill County, Or., Ordinance No. 823 (2007). LUBA may then review determinations of vested rights claims, other than those under Measure 49. Alternatively, litigation by local government or private parties may be determined by circuit courts. Those decisions are then subject to review by the Oregon appellate courts. OR. REV. STAT. § 195.318 (2007).

118 Cyrus v. Board of Commissioners of Deschutes County, note 114 *supra,* at 281-284 .

119 *See generally* Clackamas County v. Holmes, 508 P.2d 190 (Or. 1973).

120 Cyrus v. Board of Commissioners of Deschutes County, note 114 *supra*, at 281; and *See generally* Clackamas County v. Holmes, note 119 *supra*.

in undertaking construction projects pursuant to a Measure 37 waiver.[121] Although neither of the other two judges on the panel joined in Sercombe's concurrence, it is nonetheless consistent with the general hostility to uses inconsistent with the local comprehensive plan or land use regulations, as discussed below.[122]

2. Common Law Vested Rights Factors

Holmes established that:

> When the development has reached a certain stage, the property owner is said to have acquired a 'vested right' to continue the development and subsequently to put the use to its intended function.[123]

Post-*Holmes,* the factors to be considered in determining whether a common law vested right has been established have been summarized as follows:

> (1) The ratio of prior expenditures to the total cost of the development;
>
> (2) The good faith of the landowner in making the prior expenditures;
>
> (3) Whether the expenditures have any relationship to the completed project or could apply to various other uses of the land; and
>
> (4) The nature of the project, its location and ultimate cost.[124]

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[121] Cyrus v. Board of Commissioners of Deschutes County, note 114 *supra*.. As of the end of 2009, there have been no appellate cases turning on the "good faith" factor of *Holmes,* note 119 *supra*. Two lower court cases have not given much credence to the factor. *See generally* Arnett v. State, No. 08CV470ST at 7-9 (Deschutes County Cir. Ct., Or. 2008) (memorandum opinion legislative provision that Measure 37 claimed be filed before December 7, 2007 and substantial construction occur before that date does not contain a good faith element). *See also* Campbell v. State, No. CV07120048, at 3 (Clackamas County Cir. Ct., Or. 2008) (letter opinion containing *dicta* to the effect that it is reasonable to continue construction in good faith up until election results are known.

[122] OR. REV. STAT. § 215.130. *See also* Spurgin v. Josephine County, 28 Or LUBA 383 (1994); Nehuda v. Coos County 29 Or LUBA 251 (1995); and Suydam v. Deschutes County, 29 Or LUBA 273 (1995). The issue of good faith was raised throughout the case and *Cyrus v. Board of Commissioners of Deschutes County,* note 114 *supra,* may be distinguished because an appeal was pending while construction was carried on.

[123] Clackamas County v. Holmes, note 119 *supra*. at 192 , and Corey v. DLCD, note 86 *supra*.

[124] Eklund v. Clackamas County, 583 P.2d 567, 571 (Or. App. 1978); and, while *Holmes* is universally recognized as authority for evaluating whether a property owner has obtained a common law vested right, it has not always been consistently applied. *See generally* Union Oil Co. v. Board of County Commissioners of Clackamas County, 724 P.2d 341 (Or. App. 1986) [finding that the *Holmes* factors cannot be read independently from one and other]; DLCD v. Curry County, 19 Or LUBA 237 (1990) [the

Since *Holmes*, most 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.[125]

Local consideration of a vested rights claim under a Measure 37 waiver may provide an opportunity for interested persons to participate in the Measure 37 waiver process and contest a determination favorable to a landowner.[126] Moreover, those opposing such a claim under either the "ratio" or "good faith" test (discussed below) may prevent a landowner from thwarting the local plans and regulations by playing "Beat the Clock," and winning an unseemly race when land use laws change.[127]

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county had not established which, of intervenor's expenditures incurred qualified under the *Holmes* factors and, until it did so, no vested rights determination could be made]; Eklund v. Clackamas County, *supra,* [giving great weight to the good faith factor]; Webber v. Clackamas County, 600 P.2d 448 (Or. App. 1979) [focusing on the first *Holmes* factor, the ratio of expenses already incurred to the total cost of the project, the court ruled that $110,000 was not enough to expend for a project involving 250 homes].

[125] Michael E. Judd, *Land Use*, "Nonconforming Uses and Vested Rights," §12.21 (Or. State Bar Continuing Legal Education, 1994 and Supp. 2000); and *see generally* Union Oil Co. v. Board of County Commissioners of Clackamas County, note 124, *supra*; DLCD v. Curry County, note 124, *supra*; Mason v. Mountain River Estates, 698 P.2d 529 (Or. App. 1985); Eklund v. Clackamas County, note 124 *supra*; Webber v. Clackamas County, note 124 *supra*; Cook v. Clackamas County, 622 P.2d 1107 (Or. App. 1981).

[126] Measure 37 did not require that opponents of claims have a right to be heard, nor does Measure 49 so provide. It is possible that a court will determine that a nonconforming use determination under Measure 49 is a "permit" that involves notice and an opportunity to be heard. There are no cases that have decided this issue. *See* OR. REV. STAT. 227.160 (2007) (defining "permit); (*Compare* Corey v. DLCD 152 P.3d 933 (Or. App. 2007), *adh'd to on recons*, 159 P.3d 327 (Or. App. 2007), *rev allowed* 169 P.3d 1268 (Or. 2007) and *rev dismissed as moot* 184 P.3d 1109 (Or. 2008). In *Corey*, the Court of Appeals determined that orders in Measure 37 cases were orders in contested cases requiring hearings. Ultimately, when the Supreme Court dismissed the case as moot, it also vacated the Court of Appeals decision leaving its precedental value in doubt). In addition, if the vesting determination is made in circuit court an opponent must find out about the claim and seek to intervene in order to participate.

[127] Cyrus v. Board of Commissioners of Deschutes County, note 114 *supra,* at 283, quoting Donadio v. Cunningham, 277 A.2d 375, 382-383 (N.J. 1971).

3. Good Faith

The court's consideration of good faith will be one of the most interesting points of contention in pending Measure 37 vested rights determination cases. The good faith inquiry under common law vesting brings into question whether expenditures for development under a Measure 37 waiver qualify for consideration even if the owner was aware of the upcoming election on Measure 49 or the election results before the Measure became effective.[128] Measure 49 was approved by the voters on November 7, 2007 and became effective 30 days later.[129] However, notice of the pending Special Election was provided when the legislature adopted the Measure 49 language on June 15, 2007.[130] As early as April 12, 2007, the state legislature was holding public meetings to discuss amendments to Measure 37.[131] The question is whether these dates, or others, were sufficient notice that an owner racing to "Beat the Clock" was not acting in good faith.

Because a determination of common law vested rights is performed on a case-by-case basis,[132] each Measure 37 waiver vesting case could be subject to its own specific set

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[128] As previously noted, no Measure 37 vested rights decisions have been made as of yet. However, pending vested rights cases may effectively prevent local governments from approval of projects based on Measure 37 waivers until vested rights decisions are final, due to questioning the basis for the development and thereby the financing of the same. *See* Welch v. Yamhill County, 206 P.3d 1213, 1216 (Or. App. 2009). *See also* consolidated cases DLCD v. Jackson County (LUBA No. 2009-025) and Ferns v. Jackson County (LUBA No. 2009-027) at p. 5 (2009). Friends of Yamhill County v. Yamhill County (LUBA No. 2008-129); Friends of Yamhill County v. Yamhill County (LUBA No. 2008-061), Thompson v. Land Conservation and Development Commission, 204 P.3d 808 (2009); Fischer v. Benton County, 57 LUBA 702 (2008). *See also* consolidated cases DLCD v. Clatsop County (LUBA No. 2008-176) and Oregon Shores Conservation Coalition v. Clatsop County (LUBA No. 2008-178) describing pending vested rights claim in DLCD v. Clatsop County pending before Clatsop County Circuit Court filed November 3, 2008.

[129] See http://oregonvotes.org/nov62007/abstract/results.pdf. (last visited December 28, 2009). *See also* Act of June 15, 2007, ch. 424, §25, 2007 Or. Laws 1138, 1153.

[130] Act of June 15, 2007, ch. 424, 2007 Or. Laws 1138, 1153.

[131] See http://arcweb.sos.state.or.us/legislative/tracings/2007tracings/2007hb3540.htm (last visited December 28, 2009).

[132] Clackamas County v. Holmes, note 119 *supra*, at 197.

of standards.[133] Perhaps the test should be stringent, holding landowners to a notice based on the date of the referral of Measure 49 to the voters on June 15, 2007.[134] Others might choose the date when the unofficial election results were available, while still others would use the date of the certification of election results or the effective date of the Measure itself.

If that date coincided with when voters were sent Special Elections materials, any claim of a vested right based on expenditures after October 23, 2007 could be based on bad faith because, as Justice Sercombe emphasized in *Cyrus*,

> [c]ommencement of building operations can be considered nothing more than a hasty effort to attempt to acquire an unassailable position to which it equitably should not be entitled.[135]

As good faith involves weighing facts and applying legislative policy, timeframe and context will be paramount in applying Measure 49 in vested rights cases.

C. Ownership Issues

The relief provides under Measure 37 involved a broad definition of ownership interest in property. Specifically, the Measure provided the possibility for compensation based on the land use regulations enacted after the property was acquired by the "current owner" and allowed the holder of "any interest" in property to bring a claim.[136]

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[133] An even more Draconian test could be applied for those parties tainted by their participation in the passage of Measure 49 as discussed in Part III (B) *infra*. Those participants with knowledge of the tacit agreement to allow Measure 49 to go forward should be, in a perfect and just world, subject to an earlier timeframe for judging good faith. However, the authors also recognize the limited evidence available to implicate these parties in the agreement to allow a Measure 49 "fix" to the problems associated with Measure 37.

[134] Such a test would require permission for discovery of any client attorney agreement dates for these Measure 37 common law vested right cases.

[135] *See* note 127, *supra.*

[136] OR. REV. STAT. §197.352(11)(C) (2005). The most litigation in Washington County was about the text under Measure 37 that allowed relief for the owner or "any interest therein" which led to cases on marital rights and land sales contracts. OR. REV. STAT. §197.352(11)(A) (2005).

Moreover, that current owner could tack on additional time for compensation purposes if the acquisition date were based on that of a family member.[137] Therefore, under Measure 37 "family member" was an expansive term.[138]

The result of this broad definition was to promote consideration of as much time to calculate lost value as possible if seeking public payment from a public entity imposing the land use regulation.[139] The huge amount of public funds involved under the expansive definition of "family member" was one reason among many why land use regulatory bodies chose to issue a waiver in lieu of compensation as a means of avoiding one-sided attorney fee claims.

In contrast, Measure 49 sought to reduce the amount of overall compensation exposure for affected public agencies thereby limiting the issuance of waivers for uses that are inconsistent with current local plan or land use regulations. Measure 49 also narrowed the scope of persons who are eligible to seek relief by significantly limiting the definition of "owner." Thus, under Measure 49, an owner is defined as:

> (a) The owner of fee title to the property as shown in the deed records of the county where the property is located;
>
> (b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

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137 OR. REV. STAT. §197.352(3)(E) (2005).

138 OR. REV. STAT. §197.352(11)(A) (2005). Specifically, the term included:

> the wife, husband, son, daughter mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one of the combination of these family members or owners of the property.

139 Notably, Measure 37 did not include unmarried partners. Edward Sullivan, *Year Zero*, note 1 *supra,* at 146.

> (c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner.[140]

In addition, the relationship of a family member, past or present, to the acquisition of ownership was also severely limited in Measure 49. An owner may claim a relational acquisition date, based only on marital status:

> If the claimant is the surviving spouse of a person who was an owner of the property in fee title, the claimant's acquisition date is the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is later.* * *[141]

Further, the definitional change was also drafted to resolve situations involving relation-back attempts by claimants who had previously transferred property to gain other benefits. These other benefits may have included preferential tax treatment based on change in ownership, intent to give a gift while retaining some interest, or other circumstances that lead claimants to transfer and at times re-acquire property.

For example, in *Frank v. DLCD*,[142] Petitioner and her husband owned the subject property as tenants by the entirety, by a July 1, 1957 bargain and sale deed.[143] On March 28, 1978, Petitioner and her husband terminated the survivorship function of the tenancy by the entirety by conveying the property to their attorney, who immediately conveyed the property back to the couple, as tenants in common.[144]

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[140] OR. REV. STAT. §195.300(16) (2007).

[141] OR. REV. STAT. §195.328(2) (2007). Under Measure 37, the holder of "any interest" in property could bring a claim. The more limited language for entitling only some spouses to make a claim under Measure 49 was no doubt a response to the prospect of that expansive liability.

[142] Frank v. DLCD, note 96 *supra* at 412.

[143] *Id.*

[144] *Id.*

During the Measure 37 consideration of Petitioner's claims, the Department of Administrative Services and DLCD concluded that the acquisition date was the date of the tenancy in common, March 28, 1978.[145] Based on the 1978 acquisition year, the property would be subject to the statewide planning goals adopted in 1975, which resulted in the land being zoned exclusive farm use, severely limiting the potential for development.[146]

The Court of Appeals denied Petitioner's claim based on the plain text of Measure 49.[147] Measure 49 states in relevant part:

> If a claimant conveyed the property to another person and reacquired the property, whether by foreclosure or otherwise, the claimant's acquisition date is the date the claimant reacquired ownership of the property.[148]

Therefore, the court recognized that a determination of the meaning of "date of acquisition" and "the time the owner acquired the property" under Measure 37 provides no guidance to the parties because different standards will govern Petitioner's development rights under Measure 49.[149] The petition for review in this case was subsequently dismissed because Measure 49 used a different definition of "owner," under which Petitioner did not qualify.[150]

In *Olson v. DLCD,*[151] father and son maintained differing ownership interests in property located in Marion County. The father, S. David Olson originally acquired the

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145 *Id.* at 413.

146 *Id.* at 412.

147 *Id.* at 414.

148 OR. REV. STAT. § 195.328(3) (2007).

149 Frank v. DLCD, note 96 *supra,* at 414.

150 *Id.*

151 Olson v. DLCD, 184 P.3d 1220 (Or. App. 2008).

five-acre parcel of rural farmland on September 21, 1964.[152] He built a home on the property and sometime after 1964, the property was zoned for exclusive farm use which did not permit the construction of additional single-family dwellings.[153]

Olson's son gained an interest in the property when his father conveyed fee simple title to him on March 1, 2004.[154] S. David Olson reserved "ownership" rights in the Christmas trees growing on the property.[155] As security for the purchase price, Olson's son executed a trust deed naming S. David Olson as the beneficiary in the event that he failed to make a payment.[156]

In 2005 DLCD made a Measure 37 determination that denied S. David Olson's claim because neither his interest in the Christmas trees nor his beneficial interest to the trust deed made him an owner with a cognizable property interest under Measure 37.[157] However, DLCD did conclude that Olson's son was the owner of the property and elected to waive land use regulations enacted after he acquired his interest in the property in 2004.[158] Notwithstanding the waiver, the Olsons would not be entitled to rebuild nonfarm dwellings on their property.[159]

On appeal, the circuit court modified DLCD's determination because it determined that S. David Olson's interest in the Christmas trees and his beneficial interest in the property through the trust deed qualified him as an "owner" entitled to a remedy

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152 *Id.* at 1221.

153 *Id*.

154 *Id.*

155 *Id*.

156 *Id*.

157 *Id.* at 1222.

158 *Id.*

159 *Id.*

under Measure 37.[160] Therefore, S. David Olson was deemed entitled to waiver of those regulations that were enacted after his original September 21, 1964 purchase date.[161] Following this ruling, DLCD appealed.[162]

The passage of Measure 49 once again affected the outcome of pending Measure 37 litigation in *Olson*. The appellate court characterized the question of whether S. David Olson was an owner under Measure 37 as purely academic, since being superseded by Measure 49.[163] Based on the decision in *Frank*,[164] the court ruled that, except for a vested rights claim, Measure 49 is the only process available for the Olsons to establish any entitlement to deviate from the existing plan and land use regulations.[165]

It is clear that the drafting of Measure 49 reacted to pending Measure 37 cases in which a broad definition of "owner" could have resulted in development of important agricultural and forest resources. However, the tacit agreement of those interests supporting Measure 49 agreed that modification of that definition did not seriously affect development of either three or ten dwellings on lands that had been awarded Measure 37 waivers.[166]

D. Constitutionality of Measure 49

In an unpublished decision issued by the United States District Court, *Citizens for Constitutional Fairness v. Jackson County*, the court considered whether Measure 37

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160 *Id*. S. David Olson would qualify to being the holder of "any interest therein" on the property under Measure 37, an issue that was addressed in Measure 49.

161 *Id.*

162 *Id.*

163 *Id.* at 1223.

164 Frank v. DLCD, note 96 *supra,* at 411.

165 Olson v. DLCD, note 151 *supra,* 184 P.3d at 1224.

166 *See* Part III (B) The Timber Industry's Special Interest, *supra*.

waivers have continuing validity, notwithstanding passage of Measure 49.[167] One plaintiff in the case, Velma Dickey, held an ownership interest in about 70 acres of land near Ashland,[168] having acquired the property in 1971 when there were no zoning restrictions on it.[169] Based on a 2004 Measure 37 claim by Mrs. Dickey, Jackson County decided in March 2006 to waive land use restrictions that were in effect since she first acquired the property.[170] Plaintiffs claimed that the County's decision on their Measure 37 claim was a judicial order because Jackson County is a home rule county where the Board of Commissioners has reserved its judicial authority, powers and functions.[171] In 2007, Mrs. Dickey was pursuing pre-application conferences with Jackson County to approve a seven lot subdivision.[172] During this review the County observed that Mrs. Dickey did not have a Measure 37 waiver from the State of Oregon.[173]

Notwithstanding any debate regarding state approval of a Measure 37 waiver for Mrs. Dickey, the County determined in December 2007, that the Measure 37 waivers were no longer valid because of passage of Measure 49.[174] Plaintiffs successfully argued that Measure 37 waivers were binding constitutionally protected contracts between plaintiffs and the County because the court viewed the waivers as settlement

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[167] Citizens for Constitutional Fairness v. Jackson County, note 92 *supra*. at *1.

[168] *Id.*

[169] *Id.*

[170] *Id*.

[171] Plaintiff's Complaint in Citizens for Constitutional Fairness v. Jackson County, Civ. No. 08-3015-PA, 2008 WL 4890585 (D. Or. November 12, 2008) at p. 4.

[172] Citizens for Constitutional Fairness v. Jackson County, note 92, *supra.*

[173] *Id.*

[174] *Id.*

agreements.[175] In effect, the settlement agreements occurred when plaintiffs provided consideration in an agreement to drop their claims for monetary compensation in exchange for a waiver of otherwise applicable zoning regulations.[176]

In addition, the court ruled alternatively that Measure 37 waivers are final quasi-judicial orders, and that Measure 49 cannot rescind the waivers without violating the separation of powers doctrine.[177] The county issued waivers to the claimants in this case and no one appealed these decisions. Since neither party appealed these final local decisions, the court found the Measure 37 waivers became binding on the parties.[178] At least in the view of the court in this case, the plaintiff's Measure 37 waivers were valid and enforceable notwithstanding a legislative change because, by virtue of the doctrine of separation of powers, judicial decisions cannot be set aside by legislation.[179] This determination is currently on appeal to the Ninth Circuit Court of Appeals.[180]

The State of Oregon filed briefing in the matter as amicus curiae and argued that benefits conferred by legislation do not create constitutional rights and may be altered or

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175 *Id*. at *2 - *3. Analysis of the Contracts Clause under the United States Constitution is beyond the scope of this article. Suffice it to say that a higher federal court will likely decide whether Measure 37 waivers are constitutionally protected rights that must be honored in a post-Measure 49 world. If such a determination is upheld, the authors recognize that a fresh number of cases will be resurrected from the wake of Measure 37 and require a new analysis as to how the state courts should handle such an outcome.

176 *Id.*

177 *Id.* at *4.

178 *Id.* However, the Court added: "This ruling does not give plaintiffs rein to develop their property. Just as Jackson must honor its obligations under the Measure 37 waivers, so plaintiffs must comply with the conditions imposed by the waivers, which include applicable zoning restrictions."

179 *Id*. Analysis of the doctrine of separation of powers as applied to a state constitutional amendment enacted by the voters is beyond the scope of this article. Suffice it to say that a higher federal court will likely decide whether Measure 37 waivers are constitutionally protected rights that must be honored in a post-Measure 49 world. If such a determination is upheld, the authors recognize that a fresh number of cases will be resurrected from the wake of Measure 37 and require a new analysis as to how the state courts should handle such an outcome.

180 Citizens for Constitutional Fairness v. Jackson County, Court of Appeals Docket No. 09-35653.

eliminated by subsequent legislation.[181] Rather than framing the argument in terms of a private contract, the State argued that the proper analogy is that Measure 37 waivers are like legislatively created benefit programs.[182] As the State explained, such benefit statutes can be altered by subsequent legislation.[183] As the case moves through the appellate level and Oregon appellate courts consider similar arguments, many of these concepts will be analyzed anew.

E. Process-Related Litigation

Oregon's law provides that:

> If an application was complete when first submitted * * * and the county has a comprehensive plan and land use regulations acknowledged[184] under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.[185]

The Oregon Court of Appeals has described the legislation and the source of its popular name, the "goal-post statute," as a prohibition on "moving the goals posts." That is, after an application has been completed in a timely fashion, state and local governments may not apply newly enacted legislation that alters the criteria by which the application is

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[181] State of Oregon's Amicus Brief at p. 4 filed in Citizens for Constitutional Fairness v. Jackson County, Civ. No. 08-3015-PA, 2008 WL 4890585 (D. Or. November 12, 2008). Since the State could not be joined as a party because of its sovereign immunity to be made a party by Jackson County's Third Party Complaint, the State appeared as *amicus curiae* to be heard on the constitutional questions involved in the case. *Id.* at 1.

[182] *Id.* at p. 5.

[183] *Id.*

[184] Acknowledgment is a process where the Land Conservation and Development Commission reviews locally developed plans and implementing regulations for compliance with the statewide goals. It is important to local governments because, until acknowledged, they are required to make land use decisions under their plans and regulations, as well as the statewide planning goals. Once acknowledged the goals are deemed incorporated in the plans and regulations and are not required to be addressed separately. (OR. REV. STAT. § 197.251 (2007) and OR. ADMIN. R. 660 division 3 (2007)). *See* note 16, *supra,* and related text.

[185] OR. REV. STAT. § 215.427(3)(a) (2007). A similar statute, OR. REV. STAT. § 227.178(3)(a) (2007), applies to cities.

reviewed.[186] However, landowner acquiescence or major material changes in the application may subject a property owner to existing laws instead of those laws in effect on the application date.[187]

In *Pete's Mountain Homeowners Association v. Clackamas County* ("*Pete's Mountain I*"), the applicant in question received Measure 37 waivers from the state and county for its proposed 41-lot subdivision, called "Tumwater" on property located in the county's Agriculture/Forest zone.[188] Based on the applicant's Measure 37 waivers, the county hearings officer approved Tumwater and the decision was appealed to LUBA.[189] LUBA remanded the hearing officer's decision on November 15, 2007 on non-Measure 37 grounds and less than a month later, Measure 49 took effect.[190]

Petitioners argued that the subdivision application was moot because Measure 49 took effect and the applicant's Measure 37 waivers no longer had effect.[191] In contrast, the applicant argued that it was protected by the fixed goal post statute.[192] In reliance on *DLCD v. Jefferson County* ("*Burk"*), LUBA found that Measure 37 waivers do not constitute those standards and criteria that are applicable at the time the application was first submitted and generally thereafter.[193]

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186 Sunburst II Homeowners Association v. City of West Linn, 720 P.2d 1213, 1215 (Or. App. 1990). This concept is sometimes referred to as "statutory vesting" because it does not depend on physical improvement or investment by the landowner for the vesting to be valid.

187 Tarjoto v. Lane County, 36 Or LUBA 645, 664-65 (1999), and Petree v. Marion County, 29 Or LUBA 449, 452-53 (1995).

188 Pete's Mountain Homeowners Association v. Clackamas County, 57 Or. LUBA 472, 474 (2008).

189 *Id.*

190 *Id.*

191 *Id.* at 476.

192 *Id.* at 481.

193 *Id.* at 481-482.

In *Burk*, the property owner William Burk received Measure 37 waivers for his 160-acre parcel of property.[194] Burk then filed an application for a residential subdivision for up to 100 lots.[195] During the pendency of his application, Burk died and his estate, the Petitioner, claimed a vested right in the Measure 37 waivers that authorized Burk's original application.[196] The court denied a vested right because Petitioner did not establish a vested right to Measure 37 waivers.[197] Instead, the court concluded Burk's death was a material change in the application because Measure 37 waivers were not transferable.[198] Thus, Petitioner could not claim the application was subject to the goal-post statute[199] and the original Measure 37 waiver no longer provided Petitioner with relief from current land use regulations.

In *Pete's Mountain I*, LUBA concluded that, based on *Burk*, the only way for the applicant to gain authorization for the Tumwater subdivision, was to obtain a judgment from the circuit court that he has obtained a common law vested right to complete a 41-lot subdivision under Measure 49.[200] However, on appeal, in *Pete's Mountain Homeowners Association v. Clackamas County* ("*Pete's Mountain II*"), the court found a flaw in LUBA's reasoning because the *Burk* holding was limited to the specific

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194 Burk, *supra*, 188 P.3d at 314.

195 *Id.*

196 *Id.* at 315.

197 *Id.* at 317.

198 *Id.* at 316.

199 *Id.*

200 Pete's Mountain Homeowners Association, note 188 *supra,* 57 Or. LUBA at 484.

circumstances of Burk's death during local government review of his subdivision application.[201]

In *Pete's Mountain II*, the court treated the application of the goal-post statute to Measure 37 waivers as a question of first impression.[202] The court reasoned that, based on Oregon Supreme Court precedent, the effect of Measure 37 waivers amounts to an amendment of the standards and criteria which govern consideration of a land use application, it necessarily follows that the waivers are themselves standards and criteria within the meaning of the goal-post statute.[203]

Notwithstanding the applicability of the goal-post statute, the court concluded that Measure 49 supersedes Measure 37.[204] Although the goal-post statute, as applicable to Measure 37, would fix the Measure 37 waivers as standards and criteria, the specificity of Measure 49 as replacing the Measure 37 waiver remedy prevails based on the court's statutory construction analysis. The court relied on the Oregon Supreme Court's rules of statutory construction to give preference to the more specific statute over the more general and that when an earlier statute is inconsistent with a later one, the later statute is held to implicitly repeal the earlier to the extent of the inconsistency.[205] Tumwater could not be approved because Measure 49 superseded both the Measure 37 waiver and the goal-post statute.[206]

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[201] Pete's Mountain Homeowners Association v. Clackamas County ("Pete's Mountain II"), 204 P.3d 802, 805 (2009).

[202] *Id*.

[203] Pete's Mountain II, note 201 *supra,* at 806; MacPherson v. DAS, 130 P.3d 308, 317-318 (Or. 2006).

[204] Pete's Mountain II, note 201 *supra,* at 807.

[205] *Id*.

[206] *Id.* at 807-808.

The result of this line of cases establishes that absent a vested right, previously waived land use regulations during the Measure 37 era are no longer in effect, and, aside from vested rights claims, project approvals must be processed solely in accordance with the remedies authorized by Measure 49.

F. The Dorothy English Case – A Peculiar Exception

The family of Dorothy English, the 2004 spokes model for Measure 37, ultimately reaped the benefits of the voter passed initiative by receiving a trial court judgment in the amount of $1,150,000.[207] Ms. English was the woman that proponents of the Measure symbolized as the innocent victim of Oregon's evolving land use system. She appeared on television advertisements and campaign mailing pieces as an example of those Oregonians who lost value through steadily stringent but incremental changes in the state and local land use regime. English claimed she purchased her property for the purpose of subdividing it into smaller parcels to divide it among her children. Ms. English claimed she was not able to realize her dream due to the changes to local land use regulations at the direction of the state and enacted after she and her late husband purchased the property. Notwithstanding the magnitude of the money judgment in this case, the case involved certain unique circumstances, particularly with regard to the public agency litigation strategy, that will unlikely occur again.

The compensation award resulted from a final judgment made in December 2006. The judgment was based on a stipulation of the parties to the amount of just compensation during the compensation proceeding against Multnomah County (the

[207] *See* Discussion of English at note 33, *supra,* and accompanying text. *See also* "Lawless" Land-Use Decisions Criticized, PORTLAND TRIBUNE, April 11, 2008 (on file with authors). Prior to the court making a final judgment regarding the amount of compensation she would receive, Ms. English passed away. Her estate continued the case to final judgment on her behalf.

public agency that imposed the local land use regulations).[208] The 2006 judgment was entered pursuant to Measure 37.[209] Nonetheless, the county appealed the trial court's decision.[210] By mid-February 2007, the Board of County Commissioners issued its third order with respect to the English property, describing the regulations that it would apply to English's property and the process that would be used to develop the property.[211] In effect, the County finally decided to grant a waiver of land use regulations more consistent with the claims of Ms. English as to "lost value" and taking a broader view of those regulations that would be waived. On the same day, county counsel filed a motion to dismiss its appeal of the 2006 judgment in favor of the English Estate in the compensation proceeding.[212]

However, the county's strategy to dismiss its appeal of the compensation proceeding was inconsistent with any argument it could make to avoid payment of the judgment. Notwithstanding the county's attempt to claim that passage of Measure 49 deprived that judgment of "continuing viability," the Oregon Court of Appeals dismissed these contentions by examining the critical dates of the English case.[213] The court concluded that the compensation judgment was fully and finally adjudicated over nine months before the effective date of Measure 49.[214]

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208 State ex rel. Dorothy English 206 P.3d 224, 227 (Or. App. 2009) ("*English I*").

209 *Id.* at 226.

210 *Id.* at 227.

211 *Id.*

212 *Id.*

213 *Id.* at 228.

214 *Id*.

Further, the court criticized the county's last ditch defense that the appeal of the trial court's decision to enforce the compensation award against the county in favor of English was part of ongoing adjudication of English's Measure 37 claim explaining:

> However, in this case, unlike in *Corey* and *Cyrus*, there is no Measure 37 claim that can be superseded by Measure 49. That is so because "once a claim is reduced to a judgment, the claim is extinguished because it is 'merged' into the judgment and rights upon the judgment are substituted for the former claim." ***
>
> Any right to obtain appellate review of that compensation judgment expired in February 2007 – that is, over nine months before the effective date of Measure 49 – when the county moved to dismiss its appeal and we issued the appellate judgment.[215]

Not only did the county's actions cost it the $1,150,000 judgment for English, but also attorneys' fees, and expenses.[216] English's attorneys' fees were further supplemented by the appellate court's more recent decision to declare English the prevailing party in the litigation so that the estate could collect further attorney fees for its efforts to secure its original attorney fee claim.[217] The county did not appear in the proceedings for the court's reconsideration of prevailing party status.[218]

The Court of Appeals considered the attorney's fees award in October 2009 and allowed attorney fees, costs, and disbursements for approximately $200,000.00, where $191,289.30 represented the amount of attorney fees.[219] Combining the judgment and

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[215] *Id.* at 229.

[216] English v. Multnomah County, 209 P.3d 831, 835 (Or. 2009) ("*English II*"). On remand, the amount may be reduced based on attorney fees that English was obligated to pay her attorney fees based only on the hours her attorneys spent prosecuting this matter multiplied by their hour billing rates plus interest. *Id*. at 839.

[217] English ex rel. Douglas Sellers v. Multnomah County 213 P.3d 1265, 1267 (Or. App. 2009) (*"English III"*).

[218] Metro (the Portland Metropolitan Service District) did not take the same course as in the *English* cases, avoiding a final judgment problem in *Bleeg v. Metro*, 211 P.3d 302, 304 (Or. App. 2009) where a pending Measure 37 award of just compensation in the amount of $14,818,158 became nonjusticiable because the legal proceedings extended beyond December 6, 2007 when Measure 49 became effective.

[219] English ex rel. Douglas Sellers v. Multnomah County, 219 P.3d 594, 600 (2009) (*"English IV"*).

attorneys fees, the County spent nearly $1.5 million to resolve Dorothy English's request to subdivide her property.

G. Administrative Activity to Implement Measure 49

The Oregon Department of Land Conservation and Development ("DLCD") received approximately 4,600 Measure 49 Election returns at the end of June 2008; the final date by which most returns were due to the department.[220] The Oregon Legislature has set an internal deadline of June 30, 2010 for DLCD to respond to claimants with a final opinion and order.[221] Resource limitations, however, led to less staff being available and the likelihood that the deadline would slip.[222] The Measure 49 process requires the application of legal criteria involving the application of land use regulations at a particular acquisition date. Because there is a measure of legal discretion in determining whether a pending or granted Measure 37 claim meets the somewhat different standards of Measure 49, that discretion must be exercised with a measure of political wisdom as well as legal correctness. The perception to be avoided in the application of Measure 49

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[220] See http://www.lcd.state.or.us/LCD/MEASURE49/index.shtml. (Last visited December 28, 2009).

[221] See Enrolled House Bill 3225-B, § 8, Reg. Sess. (Or. 2009). Oregonians in Action took credit for this deadline. *See* Oregonian in Action Letter to property owners, September 18, 2009 (on file with authors). House Bill 3225-B also allowed some property owners who were unable to timely file appraisals in support of a Measure 49 Election application to extend the deadline for submission of their election to December 31, 2009. See Enrolled House Bill 3225-B, § 3, Reg. Sess. (Or. 2009). Approximately 100 – 200 additional claims are anticipated under HB 3225. Interview with Carmel Bender Charland, Compensation & Conservation Ombudsman, DLCD in Portland, Or. (October 21, 2009).

[222] Much of the general fund increase depended upon the imposition of higher corporate and personal income taxes, the legislation for which was subsequently referred to the voters. See Enrolled House Bills 2649 and 3405, Reg. Sess. (Or. 2009). Referred to the voters pursuant to OR. CONST. art. IV, § 1. House Bill 2649 is referred to voters as Measure 66. See http://www.leg.state.or.us/comm/commsrvs/jcbm/es66.pdf (last visited December 28, 2009). House Bill 3405 is referred to voters as Measure 67. See http://www.leg.state.or.us/comm/commsrvs/jcbm/es67.pdf (last visited December 28, 2009). If these taxing measures are ultimately unsuccessful, there will likely be further slippage in the deadline.

is that DLCD is merely utilizing this review in order to deny Measure 49 waivers in which Measure 37 waivers had been previously approved.

VI. Conclusion

Measure 37 was a colossal policy misadventure, for it was enacted by virtue of the use of broad concepts and slogans, such as "just compensation" and "fairness" and gave scant attention to the details of the "pay or waive" alternatives. Measure 37 was badly written and ultimately unsustainable as land use policy. The substitution of the ham-handed initiative process in place of a more deliberative legislative process may have advantages on occasion, but often results in multiple unanticipated consequences, such as binary conclusions and lack of discussion or amendment, with attendant costs.

Moreover, the initiative process is influenced by money and gives a premium to presentation, sometimes at a cost to the subtlety of detail. Measure 37 was one of 26 measures presented to Oregon voters in 2004 in an election filled with national and state candidates and measures.[223] The slogans proved to be powerful and the Measure was enacted. In the end, voters were alarmed with what they had wrought and corrected their own mistake less than three years later. However, the correction did not take place until a great deal of time and effort, as well as public and private funds, were expended to explore the parameters of the Measure, particularly its integration with the existing land use system.

Nevertheless, costs must be incurred to correct the excesses of Measure 37, not only in terms of the expectations of those hoping to benefit by that Measure, but also to the public in terms of dealing with the challenges to those corrections. It may well be

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[223] *See generally* Edward Sullivan, *Year Zero,* note 1, *supra,* at 138-139.

argued that it was wise to avoid potential constitutional challenges to Measure 49 by exempting "on the ground construction" that had begun, potentially committing land to an otherwise-unlawful use and limiting claims and waivers not involving vested rights to a far narrower opportunity for relief. With the exception of the federal trial court case now on appeal, that choice has been vindicated politically as well as judicially as Measure 49 has broadly been upheld.

While Measure 49 is likely to be judged a success as new policy to correct the problems created by Measure 37 and to introduce a relatively mild new regime to deal with new land use regulations,[224] these corrections are not without cost. Litigation resulting from Measure 49 (both testing the Measure itself and vested rights claims thereunder) is ongoing, as is the administrative process in reviewing claims. The Measure 49 portion of the Oregon land use story presents an object lesson on the need for deliberation in adoption or amendment of policy and the high cost of correcting unclear and improvident voter passed initiatives.

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[224] The impact of S.B. 691 on forest regulations is less clear. *See generally* Enrolled Senate Bill 691, Reg. Sess. (Or. 2009) and text at http://www.leg.state.or.us/09reg/measures/sb0600.dir/sb0691.en.html. (Last visited December 28, 2009).