

# Learning Lessons From Oregon's Experiment with Measure 37

by Courtney Johnson and Ralph Bloemers, Staff Attorneys

Oregonians are still learning hard lessons about the cost of former Measure 37 on communities throughout the state. Initially, farm and forest land was opened up to mining, strip mall developments and large residential subdivisions. These development proposals pitted those with a narrow, individual view of property rights against property owners who may have also had a Measure 37 claim, but were guided instead by a broader, community-oriented perspective of property values. While Measure 37 was sold to the public as a way to protect the property rights of all people, neighboring property owners discovered they had little recourse under the law to ensure that new developments would not threaten their drinking water, undermine the use and enjoyment of their land, and erode the livability of their communities.

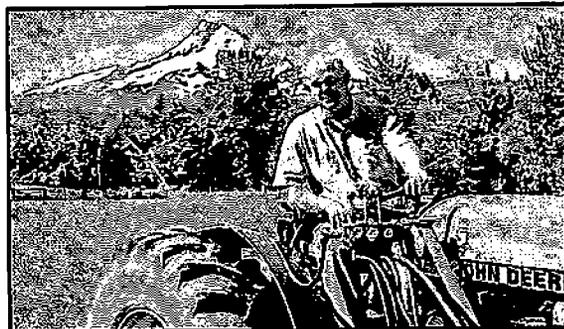
In 2007, Oregonians passed Measure 49 to limit the rampant abuse of Measure 37. As a ballot measure, Measure 49 provided voters with a way to curtail large development claims and vote for the best equivalent to what they thought they supported when they voted for Measure 37. Measure 49 prohibits large-scale industrial or commercial development in natural resource areas outright and allows landowners to build either a small number of homes or an amount equal to a proven loss in value.

Measure 49 has presented its own challenges, yet at a far lesser scale than its predecessor. While most landowners who filed Measure 37 claims have elected to build a smaller number of homes, many are

bent on trying to continue claims for large, urban-scale subdivisions, gravel mines and commercial strip malls on rural resource land. A number of claimants are taking it a step further by challenging the validity of Measure 49, claiming it violates the constitution. As a result, the need for Crag to step up to help local people protect Oregon's forest and farmlands continues.

In recent months, Oregon's courts have clarified some of the uncertainties in the transition from former Measure 37 to Measure 49. For example, the Oregon Supreme Court affirmed that Measure 49 extinguished all waivers issued under former Measure 37 and provided new options in lieu of those waivers. The only avenue by which a waiver under former Measure 37 can have continuing validity is if the claimant can show they have a "vested right" to continue the development, meaning the claimant must have completed enough work towards establishing the proposed development.

Oregon courts weigh a number of factors to make this call, including whether the work done can be adapted to a use



Hood River pear farmer Mike McCarthy.

photo by Barbara J. Bond

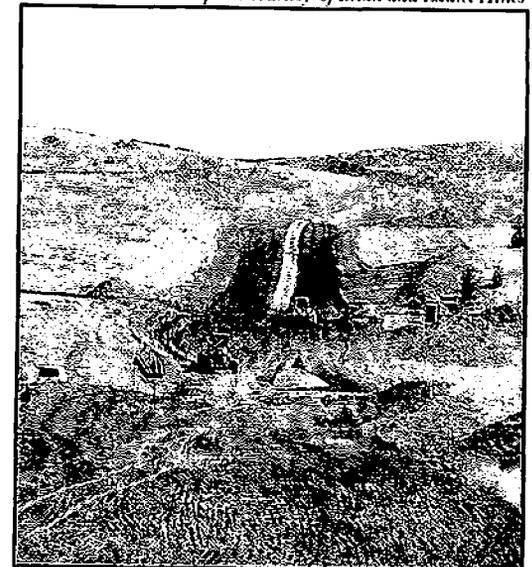
that is in compliance with the law and how much money has been spent in relation to the total project cost. Key questions still remain unanswered regarding how to interpret these factors, and Crag is representing local citizen groups and neighbors to ensure that the law is adhered to and that the values of farm and forest lands are considered in the process.

Some claimants are attempting to block the application of Measure 49 by arguing that Measure 37 set up "fixed goal posts" that could not be changed. Oregon's "goal post" rule provides that once a land use application is complete, the standards and criteria that apply to that application become "fixed" and changes to land use laws will not alter the standards applied to that application. In April, the Oregon Court of Appeals rejected this argument and found that claimants may not rely on the goal post statute to continue development under Measure 37.

Other claimants are challenging the overall validity of Measure 49, arguing that the relief provided under Measure 37 created a contract between a claimant and the state or county. Crag is currently representing citizens and conservation groups throughout Oregon in a case before the 9<sup>th</sup> Circuit Court of Appeals that we hope will settle these issues once and for all.

Measure 37's backers focused narrowly on individual rights and used the promise to protect "property rights" as the hook to reel voters in. Yet Measure 37 did not possess statutory language to guide its fair implementation. Instead it imploded Oregon's land use system, forcing governments to give away the store without evidence from claimants of an actual loss in property value as a result of land use laws. Because Measure 37 el-

photo courtesy of Brian and Laurel Hines



Developers race to vest near one client's property in Marion County

evated one person's rights at the expense of all others, the legislature proposed Measure 49 and the citizens of Oregon responded by passing it.

Quite tellingly, a number of neighboring property owners who are now challenging vested rights claims actually voted for Measure 37 in 2004. When Oregonians learned that Measure 37 undermined the use and enjoyment of their property and allowed a select few to ignore community supported land use safeguards, they took action to protect their communities.

Our clients are meeting these challenges because they are concerned about their backyards and their communities. They are not anti-property rights as Measure 37 promoters might say. Rather, they are supporting a broader, community-oriented concept of property rights. As land owners, they recognize that they are fortunate to own property that is part of something larger and plan to pass it on to future generations in a similar condition. ●