



**DEPARTMENT OF JUSTICE
APPELLATE DIVISION**

July 9, 2010

Via First Class Mail

Hon. David V. Brewer
Hon. Rick T. Haselton
Oregon Court of Appeals
Supreme Court Building
1163 State Street
Salem, OR 97301

Re: Pending Measure 37 & 49 Vesting Cases

Dear Judge Brewer and Judge Haselton:

During oral argument held on June 8, 2010 in the case of *State v. Crook County* (CA 142004), Judge Haselton asked the parties for information about other pending cases involving claims of vested rights under Measure 49, Section 5(3).

The State has prepared and attached a list of cases that the State is aware are pending before the Oregon Court of Appeals involving claims of common law vested rights or other claims that Measure 37 relief survived the passage of Measure 49. This list does not include petitions for review of other orders issued pursuant to Measure 49.

The cases involving dismissal of Measure 37 litigation generally involve both statutory construction and constitutional issues (e.g. separation of powers, impairment of contract, substantive due process).

The attached list of cases also includes cases to which the state is not a party. This list is primarily based on information supplied by Ralph Bloemers and Courtney Johnson.

Sincerely,


Stephanie Striffler
Senior Assistant Attorney General

cc:

Ralph Bloemers (Crag Law Center)
Kristian Roggendorf (Curry, Luethe)
Stephen Crew (Luethe)
Stephen Madkour (Multnomah County)
Edward Fitch (Hudspeth, Powell, Riemenschneider, Leason)
Lisa DT Klemp
Steven Lounsbury (Clackamas County)
William C. Cox (Rood, Norwood, Smejkal)
Christopher Gilmore (Washington County)
Jacqueline Haggerty (Coos County)
Brian Branch (Crook County)
David Gordon (Crook County)
Dan Chandler (Clackamas County)
Elizabeth Duncan (Campbell)
Steve Abel (McClure)
Charles Hudson (Cook)
John M. Gray (Yamhill County)
Edward H. Trompke (Johnson and Gregg)
Charles H. Swindells (Johnson)
Charles Hinkle (McClure)
Joel Kalberer (Glender)
George Heilig (Fischer)
David Leonard (Martinson)
Stephen T. Janik (Martinson)
Blair Henningsgaard (Clatsop County)
James Zupancic (Fraser, Carlson)
Erick Haynie (Aspmo)
Seth King (Aspmo)
David Doyle (Polk County)
Vance Crony (Benton County)
Sean T. Malone (Mouille & Friends of Linn County)
Eugene J. Karandy (Linn County)

Cases in which the State is involved that are at issue.

Luethe v. Multnomah County and DLCD, DEQ, ODF, DAS, CA A138836

Status: Briefing complete.

Issues: Whether the Measure 37 case was correctly dismissed as moot based on Measure 49; cross-assignments of error relating to the underlying Measure 37 litigation.

Powell v. DLCD, CA 138889

Status: Oral argument held May 12

Issues: Whether the Measure 37 case was correctly dismissed as moot based on Measure 49; cross-assignment of error relating to the underlying Measure 37 litigation.

Curry v Clackamas County, DLCD, DEQ, ODF, DAS, CA A139251

Status: Briefing complete.

Issues: Whether the Measure 37 case was correctly dismissed as moot based on Measure 49; cross-assignment of error relating to the underlying Measure 37 litigation.

Leason v. DLCD, CA 139477

Status: Oral argument held June 10

Issues: Whether the Measure 37 case was correctly dismissed as moot based on Measure 49; cross-assignments of error relating to the underlying Measure 37 litigation.

Riemenschneider v. Crook County and DLCD, CA A141016

Status: Oral argument held June 10

Issues: Whether the Measure 37 case was correctly dismissed as moot based on Measure 49; cross-assignment of error relating to the underlying Measure 37 litigation.

Smejkal v. DLCD and Washington County, CA 141836

Status: Oral argument set for July 15

Issues: Whether Measure 49 can constitutionally alter Measure 37 relief; breach of contract.

Rood v. DLCD and Coos County, CA 141994

Status: Briefing complete

Issues: Whether Measure 49 could constitutionally alter Measure 37 relief; and whether the state and county were estopped from following Measure 49 based on previous Measure 37 decisions.

Vesting: Whether expenditures made in developing the property must be made by the Measure 37 claimant or whether they can be made by a third party?

DLCD v. Crook County (Hudspeth), CA A142004

Status: Oral argument held June 10

Issues: Whether DLCD has authority to appeal local government vesting decisions? Whether the county was required to take into account the cost of building houses in evaluating whether the landowner had vested residential development?

Whether the record contains substantial evidence of the cost of building houses?

Appeals in which the state is involved that are not yet at issue:

Campbell v. Clackamas County and DLCD, CA A139642 (Campbell)

Status: Briefing underway

Issues: Whether a successful appeal of a land use approval bars a claim of vested rights? Whether expenditures made in developing the property were "incurred" by the Measure 37 claimant or by the developer? In the alternative, were expenditures sufficient? Whether the trial court properly applied and considered the other vesting factors (e.g. good faith, notice, adaptability to another use)?

Friends of Polk County v. Oliver, CA 144372 (Martinson) (State is *amicus*)

Status: Briefing underway

Issues: Whether the costs of the entire development have to be taken into account in determining whether landowner is vested in the entire development? Whether the claimed loss of access value and access acquisition can properly be counted as an expenditure of developing the use? Whether the county (and the trial court) properly applied other vesting factors (e.g. ratio test, good faith, notice, adaptability to another use, kind of use, location, and ultimate cost).

DLCD v. Linn County CA A144528 (Glender)

Status: Briefing underway

Issues: Whether substantial evidence supports the circuit's finding that Measure 37 claimants incurred certain costs toward the completion of a residential project? Whether the county and the trial court properly applied the common law vesting factors (e.g. Are expenditures made while on notice excluded from the ratio test? Can the improvements be adapted to other uses?)

Cases in which the State is not a party of which the state is aware

Norwood v. Washington County, CA 141547

Status: Oral argument March 31

Issues: Whether Measure 49 can constitutionally alter Measure 37 relief; breach of contract.

Vesting: Whether state waiver and local permit are required for development expenditures to qualify for purposes of vesting.

The following information is provided by Ralph Bloemers & Courtney Johnson:

Friends of Yamhill County v. Yamhill County, CA A140899 (Cook)

Friends of Yamhill County v. Yamhill County, CA A141019 (McClure)

Status: Oral argument held January

Issues: 1) As a matter of law had the owner finalized the M37 "use variance" (Cyrus) that had been allowed by the Measure 37 waiver order to be able to make a claim of vested rights? In other words, did the owners secure the necessary permits and authorizations to construct the use? What part of the structures envisioned had been constructed on the ground.

2) As a matter of law, did the county decision maker properly construe and apply the common law and measure 49 in evaluating the common law of vesting? Specifically, did the owner put forward sufficient evidence to satisfy the common law factors necessary to complete and continue a use? Factors at issue include: Notice, good faith, adaptability, substantial cost ratio test, etc. For example, one key issue is whether the total project cost must include a reasonable estimate of the range of building the project as envisioned prior to passage of M49. Another issue involves the

application of notice and good faith for expenditures made after Measure 49 was put on the ballot.

Biggerstaff v. Yamhill County, CA 140978 (Johnson)
TJ Kleikamp & Friends of Yamhill County v. Yamhill County, CA 140999 (Gregg)

Status: Oral argument May 2010

Issues: Same as in Cook & McClure above

Fischer v. Benton County, CA 143506 (Fischer)

Status: Briefing completed

Issues: Same legal issues as above in Cook & McClure.

Oregon Shores v. Clatsop County, CA No. A143688 (Aspmo)

Status: Briefing completed

Issues: Same legal issues as above in Cook & McClure.

State of Oregon v. Clatsop County, CA No. A144073 (Carlson)

Status: Reply on cross-assignment of error due July 9th

Issue: Same legal issues as above in Cook & McClure. The case also presents the issue of whether the proposed vested right is in compliance with the terms of the Measure 37 waiver order. The Measure 37 waiver order only Goal 4 and not others.

Also: whether DLCD has authority to file writ of review.

State of Oregon v. Clatsop County, CA No. A143964 (Fraser)

Status: Reply on cross-assignment of error due July 9th

Issues: Same legal issues as above in Cook and McClure and also whether the proposed use complies with the terms of the waiver. Specifically, Goal 14 was waived but Goal 11 was not addressed or waived in the original waiver order issued under Measure 37. The application of Goal 11 limits the proposed use. The decision to grant vested rights ignores applicable law and the decision vested a use that is not in compliance with the waiver order.

Also: whether DLCD has authority to file writ of review.