BEFORE THE BOARD OF COUNTY COMMISSIONERS

FOR THE COUNTY OF TILLAMOOK IN THE STATE OF OREGON

In the Matter of Adopting a Procedure to Determine Whether an Applicant has a Common Law Vested Right to Complete and Continue a Use Allowed by a Board-issued Measure 37 Waiver.	))))))	**ORDER #08-037**

FILED
MAR 19 2008
2:29 pm
TASSI O'NEIL
COUNTY CLERK

This matter comes before the Board of Commissioners for Tillamook County, Oregon on the 19 day of March, 2008.

The Board finds as follows:

1. On November 2, 2004, the voters of the State of Oregon passed Ballot Measure 37 providing for just compensation to owners of property whose fair market value is claimed to have been reduced by the enactment or enforcement of a new land use regulation or the enforcement of a land use regulation enacted prior to December 2, 2004. Measure 37 is codified within Oregon Revised Statutes at ORS 197.352 and is incorporated herein by reference.

2. Beginning with the first Measure 37 claim filed in December 2004, the Board approved multiple Measure 37 waivers in lieu of payment of just compensation. The waivers were approved in accordance with the Board's Order implementing Measure 37, Order #04-98 and subsequent Order #07-81 amending this process.

3. In June 2007, the Legislative Assembly referred House Bill 3540 (HB 3540) to the voters. HB 3540 substantially amended ORS 197.352. HB 3540 was considered by the voters in the election of November 6, 2007 as Ballot Measure 49. The voters approved Measure 49 and Measure 49 became effective December 6, 2007. Measure 49 is codified within Oregon Revised Statutes at Chapter 424 and is incorporated herein by reference.

4. Section 2(13) of HB 3540 establishes the following definition for "just compensation":

   SECTION 2(13) "Just compensation" means:

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

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

5. Section 5 of HB 3540 provides as follows with respect to development of property in accordance with Measure 37 relief:

   SECTION 5. A claimant that filed a claim under ORS 197.352 on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:...

   (3) A waiver issued before the effective date of this 2007 Act to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.

6. Section 16 of HB 3540 provides as follows with respect to judicial review of decisions made under the new law:

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

   (2) A person is adversely affected under subsection (1) of this section if the person:

   (a) Is an owner of the property that is the subject of the final determination; or

   (b) Is a person who timely submitted written evidence, arguments or comments to a public entity concerning the determination.

   (3) Notwithstanding subsection (1) of this section, judicial review of a final determination under sections 5 to 11 or 12 to 14 of this 2007 Act or 197.352 is:
   (a) Limited to the evidence on the record of the public entity at the time of its final determination.

   (b) Available only for issues that are raised before the public entity with sufficient specificity to afford the public an opportunity to respond.

7. The State of Oregon has determined that a local government must determine vesting rights under Section 5(3) of HB 3540 for those Measure 37 waivers

the local government issued. Thus, it is appropriate to establish a process for Tillamook County's determination of whether a "claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver."

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. For purposes of this order, the following definitions will apply:

   As used in this order, words and phrases shall have the same meaning as provided in HB 3540 (Measure 49).

   As used in this order, "Community Development Director" means the Tillamook County Community Development Director or designee.

2. Any person who wishes to complete or continue any use of property allowed pursuant to a waiver shall file an application for a Vested Rights Determination as required by Measure 49. Until the Board's determination of vested rights has been made, no permits shall be issued, and, if the county has issued permits, an order stopping work under those permits will be issued.

   An application for a Vested Rights Determination must be submitted to the Tillamook County Department of Community Development in the form prescribed by the Community Development Director and signed by the owner. The complete application shall include the following information:

   (a) Name, address, telephone number, and signature of the owner filing the application.

   (b) A copy of the conveyance document that shows the applicant's interest in the real property and includes a legal description and physical address of the property.

   (c) Copies of both Tillamook County's and the State of Oregon's orders approving a waiver for the property.

   (d) A copy of any land use approvals and construction permits issued that allow development of the property.

   (e) Identification of and expenditures made to develop the property and the dates of those expenditures.

   (f) A written statement describing:

a. How the applicant's use of the property is consistent with the waiver; and

b. How the applicant has a common law vested right to complete or continue the use described in the waiver.

(g) An application fee of $250.00 plus any actual costs incurred above that fee at a rate of $44.00/hour for staff time to offset the administrative cost of processing the application. In addition, any filing or recording fees associated with the request shall be borne by the Applicant. If the actual costs for processing the Vested Rights Determination are less than $250.00, the remaining amount shall be refunded to the Applicant upon the issuance of the determination.

3. The Community Development Director will prepare a Staff Report that describes the vested rights application, sets forth all pertinent facts, and makes a recommendation on how the application should be resolved.

4. The Community Development Director's Report and recommendation shall be forwarded to the Tillamook County Board of Commissioners for a public hearing.

5. The Board of Commissioners shall conduct a public hearing on the application for a determination of vested rights.

6. After the public hearing, the Board of Commissioners shall issue an Order regarding:

   (a) Whether the applicant's use of the property complies with the waiver granted by the state and the county; and

   (b) Whether the applicant had a common law vested right on December 6, 2007, to complete and continue the use described in the waiver.

7. The Order shall be based on the Board's analysis of the Staff Report submitted by the Community Development Director, the evidence and testimony contained in the records, and applicable law.

8. The Board of Commissioner's Order shall be consistent with the Oregon Supreme Court's and Court of Appeals' decisions addressing vested rights issues and shall be based on a multifactor test that will include consideration of the factors that the courts have identified as relevant to aid in the equitable balancing test required for a determination of vested rights including but not limited to:

   (a) The ratio of expenditures incurred to the total cost of the project;

(b) The good faith of the developer;

(c) Whether the development had notice of any proposed zoning or amendatory zoning before starting the improvements;

(d) The type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to other various uses of the land;

(e) The nature, location, and ultimate cost of the project;

(f) Whether the actions rise beyond mere preparation; and

(g) Other relevant factors.

(h) A copy of the Board of Commissioner's Order shall be mailed to the applicant, the applicant's representative, any person who testified at the hearing and any person who submitted a written request for a copy of the Order.

9. If the Board determines that the applicant has a common law vested right to complete and continue the use, the county will issue land use and development permits in accordance with state and county laws and regulations.

10. Regarding the Board of Commissioner's hearing: Notice that an application will be considered on the agenda will be mailed to the applicant and to the owners of real property within two hundred fifty (250) feet of the subject property if located inside an urban growth boundary (UGB), five hundred (500) feet of the subject property if located on non-resource land outside of a UGB, and seven hundred fifty (750) feet of the subject property if located on resource land. Notice shall be mailed not less than seven (7) days prior to the date the Board will conduct the hearing.

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11. The failure of any person to receive notice of a public hearing shall not affect or invalidate any proceeding under this order.

12. The Board's decision will be subject to review by writ of review, ORS 34.010 to 34.102.

DATED this 19th day of March, 2008.

BOARD OF COMMISSIONERS FOR TILLAMOOK COUNTY, OREGON	**Aye**	**Nay**	**Absent/Abstain**
Charles J. Hurliman, **Chairperson**			/
Tim Josi, **Vice Chairperson**	✓		/
Mark Labhart, **Commissioner**	✓		/

ATTEST: Tassi O'Neil
County Clerk

BY: Susan L. Benefit
Special Deputy

APPROVED AS TO FORM:

William K. Sargent,
County Counsel

BOARD OF COUNTY COMMISSIONERS, TILLAMOOK COUNTY, STATE OF OREGON