

### **Measure 37 Claims Not Protected by “Fixed Goalpost” Rule**

The Oregon Court of Appeals continues to clean up the lingering questions following the passage of Measure 49 in 2007. In its most recent decision, the Court ruled that the “fixed goalpost rule” in ORS 227.178 must give way to the mandates of Measure 49. As a result, pending land use applications that rely on a waiver issued under Measure 37 to establish the applicable regulations may no longer rely on the waiver. Cities are now required to reach a decision on these applications under all applicable local land use regulations, regardless of the waiver.

In *Pete’s Mountain Homeowner’s Assoc. v. Clackamas County*, \_\_\_ Or App \_\_\_ (April 1, 2009), the landowner filed a claim with the County under Measure 37 and received a waiver of the local regulations that restricted subdivision development on land zoned for farm and forest use. Relying on the waiver, the landowners then filed a land use application to create a 41-unit subdivision. The County hearings officer approved the application, which was then appealed to LUBA. LUBA, in turn, remanded the decision for unrelated reasons.

While the application was pending before the County on remand from LUBA, Oregon voters passed Measure 49. According to the Court, Measure 49 “essentially supersedes Measure 37 and renders Measure 37 waivers without legal effect.” Recognizing that Measure 49 extinguished their Measure 37 waiver, the landowner argued that the land use application was nonetheless subject to the fixed goalpost statute which requires the county to issue a decision “based upon the standards and criteria that were applicable at the time the application was first submitted.” (Note, the County goalpost statute is ORS 215.427 and is materially the same as the statute applicable to cities, ORS 227.178.)

In its analysis, the Court first concluded that Measure 49 and the goalpost statute directly conflicted, and that the language of Measure 49 did not resolve the conflict. Similarly, there was nothing in the legislative history of Measure 49 that directly addressed the situation. Because neither the text, context or legislative history could be used to resolve the conflict, the Court relied on two rules of statutory construction: first, a later passed statute controls over an earlier passed statute, and second, a specific statute controls over a general statute.

Applying these rules, the Court readily concluded that Measure 49 was approved by the voters long after the goalpost statute was enacted. Second, the goalpost statute applies broadly to all quasi-judicial land use decisions, while Measure 49 only applies to those that rely on a Measure 37 waiver. Because Measure 49 was enacted after the goalpost statute and because it is a more specific statute, the Court concluded that it prevails over the goalpost statute.

As a result of this decision, land use applications that rely on a Measure 37 waiver that were still under review when Measure 49 passed must be approved or denied based on all of the relevant land use regulations in the local development code, regardless of the Measure 37 waiver.

This case adds to the body of decisions that, taken together, define the law regarding the relationship between Measure 37 and Measure 49. These cases include *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008) (“Measure 49 by its terms deprives Measure 37 waivers-- and *all* orders disposing of Measure 37 claims--of any continuing viability.”); *Department of Land Conservation and Development v. Jefferson County*, 220 Or App 518, 188 P3d 313 (2008)

(*Burk*) (death of a Measure 37 claimant creates a new land use application to which the goalpost rule does not apply); and *Cyrus v. Board of County Commissioners*, 226 Or App 1, 202 P3d 274 (2009) (Measure 49 renders an appeal of Measure 37 decision moot and underlying vested rights claim must be brought in separate proceeding under Measure 49).

The combined effect of these decisions is to extinguish all claims under Measure 37 and any permit decisions that rely on a waiver issued under Measure 37. After *Pete's Mountain*, a waiver issued under Measure 37 cannot be relied on to determine the regulations that apply to a land use application regardless of when the application was submitted or deemed complete. The only remaining valid claim that can be asserted by a landowner is one in which the landowner claims a "vested right" to complete a development that was initiated pursuant to a Measure 37 waiver. (Measure 49, section 5; see note following ORS 195.305). This claim is expressly authorized by Measure 49 and requires the landowner to show that she has made substantial good faith expenditures to implement a particular use.

In the end, a land use application that relies on a measure 37 waiver must be denied if it cannot otherwise be approved under the relevant code provisions, regardless of when the application was submitted. In those instances where the land use permit has already been issued, the city should look closely at whether the landowner has a vested right to complete the development before issuing any other permits for the project.