

What Measure 49 means for business

A Portland land-use lawyer offers his take on what the vote means for companies in Oregon

Search for workable compromise won't end

A 'yes' vote Nov. 6 won't halt the debate over property rights

Evaluation of a state's business environment considers the level of taxation and regulation, including the level of risk and return on investment relative to other opportunities for investment. If the results are unpredictable or take too long to achieve, then investment goes elsewhere.



**JOHN C.
PINKSTAFF**

LANE POWELL

Seen in this context, Measure 49 generally eliminates the rights of most business claimants under Measure 37, and it complies those rights that remain.

The voluminous provisions of Measure 49 are not easily understood nor explained. In general, however, Measure 49 repeals much of Measure 37 while retaining limited relief for current Measure 37 claimants who seek small-scale residential developments. Those who did not file Measure 37 claims by June 28 against regulations enacted before Jan. 1, 2007, will lose their right to do so, and they'll be limited to claims based on regulations enacted after Jan. 1.

Measure 49 would repeal almost entirely any Measure 37 rights for the development of commercial or industrial land. The only exception would be if a business landowner had already obtained a Measure 37 waiver permitting commercial or industrial development and had moved forward with the project to a point that it would be considered "vested" under common law. Because "vesting" determinations involve a "case by case" factual analysis, whether a particular development will be considered "vested" is frequently uncertain. Delays in claim processing, restrictive government interpretations and procedures, lengthy appeals and a legislative moratorium giving governments one more year to decide Measure 37 claims have delayed Measure 37 waivers, often turning vesting into a risky and costly race against the clock.

Likewise, those who've obtained Measure 37 waivers for residential developments would retain such benefits only if their

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developments are vested. Otherwise, they're entitled to either three houses (including any already existing on the property) or four to 10 houses – but only if the property is not "high value" farm or forest land and they're able to satisfy a detailed and rigorous claims process, including appraisals. Claimants in urban areas also may seek up to 10 homes, again, under a much more rigorous claims process.

Measure 49 would eliminate the threat of claims for compensation in circuit court; instead, claims would be decided by government land-use authorities that would be entitled to substantial deference if challenged in court. The additional time, expense and uncertainty of this process may discourage many businesses involved in residential development from pursuing claims.

Measure 49 effectively shrinks the universe of eligible claimants from all property owners to those seeking a small number of houses. That group is made smaller still by a much narrower definition of ownership. Although Measure 37 permitted claims by those holding any interest in the subject property, under Measure 49 many transfers of ownership for tax or business reasons – such as transfers to a family partnership, family corporation or limited liability corporation – will create a new owner with a new acquisition date and effectively disqualify the property from meaningful relief.

If Measure 49 fails, substantial uncertainty will remain for many claims now pending under Measure 37, and it seems likely the search for a workable compromise will not be over.

John C. Pinkstaff is a partner with the law firm Lane Powell PC in Portland, where he specializes in land-use matters.