

TIGARD MUNICIPAL CODE

Chapter 1.22 PROCESSING REQUESTS FOR VESTED RIGHTS DETERMINATION FOR PREVIOUSLY FILED MEASURE 37 CLAIMS

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1.22.010 Purpose.

The purpose of this chapter is to implement the provisions of Section 5(3) of Chapter 424, Oregon Laws 2007 by providing a process whereby claimants under Measure 37 who were issued waivers of land use regulations enacted by the City before the effective date of Chapter 424, Oregon Laws 2007, may request a decision from the City as to whether their waiver has vested .

1.22.020 Definitions.

For the purposes of this ordinance, the following definitions apply.

A. “Applicant” means a person who has obtained Measure 37 relief from the City and has applied for a City Vesting Decision.

B. “Application” means an application form created by the Director and filed with the Department by an Applicant for a City Vesting Decision.

C. “City Vesting Decision” means a written decision by City Council that, as of December 6, 2007, the Applicant did or did not have a common law vested right, pursuant to Section 5(3) of Chapter 424, Oregon Laws 2007, to continue and complete a use allowed pursuant to a Measure 37 waiver.

D. “Completed Application” means an Application deemed complete by the Director.

E. “Council” means Tigard City Council.

F. “Department” means the Tigard Community Development Department.

G. “Director” means the Tigard Community Development Director.

H. “Measure 37” means Ballot Measure 37 approved by the voters in November, 2004, and codified as ORS 197.352, 2005 replacement part.

I. “Waiver” means an order by the City Council granting Measure 37 relief.

1.21.030 City Council to Make Determination.

The City Council shall determine vested rights under Section 5(3) of Chapter 424, Oregon Laws 2007, pursuant to the criteria established by common law and described in Section 1.22.080.

1.21.040 Basis of Determination.

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A City Vesting Decision shall be based on whether the Applicant's use of the property complies with the Waiver, and whether the applicant has a common law vested right as of December 6, 2007, to complete and continue the use described in the Waiver.

1.21.050 Application Procedure.

An Applicant who obtained a Waiver may submit an Application to the Department containing the information required in Section 1.22.060 and any other information necessary to address the criteria to establish a common law vested right. The Applicant is responsible for the completeness and accuracy of all information submitted with the Application and all of the supporting documentation.

1.21.060 Contents of Application

An application for a vested rights determination shall include the following:

- A. The name, mailing address, and phone number of the Applicant.
- B. A legal description and tax lot number(s) of the subject property as well as a street address for the property, if any.
- C. A copy of the Waiver.
- D. Evidence demonstrating that the Applicant's use of the subject property is consistent with the Waiver.
- E. Information pertaining to the criteria described in Section 1.22.080 sufficient to enable the Council to make a City Vesting Decision consistent with those criteria.
- F. The application fee as set forth in Section 1.22.070.

1.21.070 Application Fee

No application shall be deemed complete unless it is accompanied by a deposit in the amount of \$1,000.00. The fee for a determination of a vested right shall be the actual cost of processing the request for a determination including, but not limited to, costs of staff time, copying, mailing, and legal review. Prior to issuance of a City Vesting Decision, the costs to the City shall be deducted from the deposit. If any portion of the deposit remains, it shall be returned to the applicant. Payment of any costs remaining unpaid after application of the deposit is required before issuance of the City Vesting Decision.

1.22.080 Criteria to Determine Vested Right.

In determining whether an Applicant has a vested right to continue and complete a use allowed under a Waiver, the Council shall consider and apply the following factors:

- A. The amount of money spent on developing the use in relation to the total cost of establishing the use.
- B. The good faith of the property owner.
- C. Whether the property owner had notice of the proposed change in law before beginning development.
- D. The types of expenditures and whether the expenditures could apply to other uses that are allowed under the new law.
- E. The kind of use, location and cost of the development.

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F. Whether the owner's acts rise beyond mere contemplated use or preparation, such as the leveling of land, boring test holes, or preliminary negotiations with contractors or architects.

G. Other relevant factors appropriate to the facts of each case and consistent with Oregon law.

1.22.090 Burden of Proof

An Applicant for a vested rights determination shall have the burden of proof of all matters asserted in the Application, and of meeting the criteria in 1.22.080.

1.22.100 Intent

The intent of Section 1.22.080 is to recite common law criteria by which vested rights determinations may be made. It is not the intent of this section to replace, supplement, alter or supersede common law principles regarding vested rights.

1.22.120 Notice of Vested Rights Hearing

Notice of a vested rights hearing shall be given as provided in TMC 18.390.050(C), except that the reference to the Land Use Board of Appeals shall be deleted.

1.22.130 Conduct of the Hearing

A. At the commencement of the hearing, a statement shall be made to those in attendance that:

1. Lists the criteria set forth in Section 1.22.080; and
2. States that testimony and evidence shall be directed toward the relevant criteria described in the staff report or other criteria which

the person testifying believes to apply to the decision.

B. The record.

1. The record shall contain all testimony and evidence that is submitted and not rejected;

2. The City Council may take official notice of judicially cognizable facts pursuant to the applicable law. If the City Council takes official notice, it must announce its intention and allow the parties to the hearing to present evidence concerning the fact; and

3. The City Council shall retain custody of the record as appropriate, until a final decision is rendered.

C. Disclosure of Ex Parte Contacts and Conflicts of Interest.

1. City Council members shall disclose the substance of any pre-hearing ex parte contacts with regard to the matter at the commencement of the public hearing on the matter. The member shall state whether the contact has impaired the impartiality or ability of the member to vote on the matter and shall participate or abstain accordingly;

2. Any member of the City Council shall not participate in any proceeding or action in which any of the following has a direct or substantial financial interest: The member or member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, partner, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment. Any actual or potential interest shall be disclosed at the meeting of the City Council where the action is being taken;

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3. Disqualification of a City Council member due to contacts or conflict may be ordered by a majority of the members present and voting. The person who is the subject of the motion may not vote;

4. If all members abstain or are disqualified, the administrative rule of necessity shall apply. All members present who declare their reasons for abstention or disqualification shall thereby be re-qualified to act;

5. In cases involving the disqualification or recusal of a hearings officer, the City shall provide a substitute hearings officer in a timely manner subject to the above impartiality rules;

6. Members of the City Council shall not:

(a) Communicate, directly or indirectly, with any party or representative of a party in connection with any issue involved in a hearing, except upon giving notice, and an opportunity for all parties to participate;

(b) Take notice of any communication, report, or other materials outside the record prepared by the proponents or opponents in connection with the particular case unless the parties are afforded an opportunity to contest the materials so noticed.

7. No decision or action of the City Council shall be invalid due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body if the member of the decision-making body receiving contact:

(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action;

(b) Makes a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action shall be considered or taken on the subject to which the communication is related;

8. A communication between City staff and the City Council shall not be considered an ex-parte contact.

9. Presenting and receiving evidence.

(a) The City Council may set reasonable time limits for oral presentations and may limit or exclude cumulative, repetitious, irrelevant or personally derogatory testimony.

(b) No testimony shall be accepted after the close of the public hearing.

(c) The City Council may visit the site and the surrounding area, and may use information obtained during the site visit to support their decision, provided the information relied upon is disclosed at the hearing and that an opportunity is provided to rebut such evidence. In the alternative, a site visit may be conducted by the City Council for the purpose of familiarizing the City Council with the site and the surrounding area, but not for the purpose of independently gathering evidence. In such a case, at the commencement of the hearing, members of the City Council shall disclose the circumstances of their site visit and shall provide the parties with an opportunity to question each member concerning their site visit.

1.22.140 The Decision Process.

A. Basis for decision. Approval or denial of a vested right shall be based on

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standards and criteria set forth in Section 1.22.080.

B. Findings and conclusions. Approval or denial of a vested right shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards, and facts set forth.

C. Form of decision. The City Council shall issue a final order containing the above-referred findings and conclusions, which either grants or denies Applicant a vested right to continue and complete their Waiver.

1.22.150 Notice of Decision

Notice of a vested rights decision shall be mailed to the applicant and to all parties of record within five business days after the decision is filed by the City Council with the Director. Failure to receive mailed notice shall not invalidate the action, provided that a good faith attempt was made to mail such notice.

1.22.160. Final Decision

The decision of the City Council is the final decision of the City and is final and effective on the date notice of the decision is mailed.

1.22.170 Review of Decision

A decision by City Council on an application for a vested right shall be reviewed only as provided in ORS 34.010 to 34.100. (Ord. 08-09)■