

Measure 37
Report and Recommendations

to

Sen. Floyd J. Prozanski, Jr.
Rep. Gregory H. Macpherson

Co-Chairs
Joint Special Committee on Land Use Fairness

2007 Legislative Session

from

Gov. Victor Atiyeh
Gov. Barbara Roberts
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I. INTRODUCTION AND SUMMARY

We have followed your committee's hearings, and the much of the illuminating testimony you have heard. We believe it would be helpful at this point to communicate our conclusions, and to offer recommendations.

Over the past ten months, we have undertaken an assessment of Measure 37. On June 20, 2006, we met with Gov. Kulongoski and his senior staff and offered our conclusions and recommendations. On July 21, 2006, Gov. Kulongoski's Legal Counsel, David C. Reese, chaired a meeting of attorneys and other experts to discuss issues raised at the June 20 meeting.

Thereafter, and at Gov. Kulongoski's suggestion, on August 28, October 13, October 18, October 27, November 8, and December 5, 2006 we met with leaders of Oregonians in Action: Dave Hunnicutt, President; Bill Moshofsky, Vice President; and Dale Riddle, Member, Board of Directors. The meetings were cordial, frank, and mutually informative. However, our December 1, 2006, 16-page proposal was not accepted. Participants agreed not to discuss statements made by the other side.

Measure 37 mainly confronts each legislator with these questions: Did Oregon voters intend Measure 37 to compensate landowners for losses caused by land use regulations? Or to give landowners windfalls based on ownership positions landowners never had and never lost?

As indicated by Table 2, p. 12, the 7,562 claims filed to date show a mixed picture: Measure 37 is doing some of what voters intended, some that's hard to tell, and some that voters clearly did not intend:

41% of claims seek 1-3 home sites. These claims involve about 2.6% of the 750,898-acre total claim acreage, but only about 4.9% of all homesites demanded. Regardless of inadequacy of proof of reduction in value, these claims raise the least concern about impacts on neighbors. As an example, the Prete family of Sisters, Oregon, co-sponsors of Measure 37, fall in this category, having gained approval for one dwelling.

31% of claims seek subdivisions of 4-9 lots. These claims involve 26% of total claim acreage, and about 9.5% of all lots demanded. As in all claims, proper proof of loss is unlikely, and 4-9 lot subdivisions raise major questions of impact, given that (1) about 109,593 acres (p. 12) likely are involved in all 4 - 9 lot claims, (2) 61% of all claims statewide are in the populous Willamette Valley, and (3) of those, 84% are on resource land.

28% of claims seek subdivisions of 10-500 lots. These claims involve 71% of total claim acreage, and 86% of all homesites demanded. Oregonians would be shocked to learn, as we were that (1) claims of any size typically are approved ***without an official determination of what the landowner actually lost***, and (2) ***in many cases compensation is based not on losses landowners experienced, but on phony, highly lucrative "monopoly" positions landowners never owned and never lost. This is what has transformed Measure 37 from a compensation-for-loss program into a get-rich-quick scheme.***

Local governments have no money to pay cash for huge compensation demands. *So Measure 37 turns phony monopoly claims into “waivers” for large subdivisions in the middle of commercial farm areas.* Oregon voters did not adopt Measure 37 to threaten commercial agriculture in four of Oregon’s top five producing counties -- Marion, Clackamas, Washington and Yamhill -- but that is what Measure 37, distorted by monopoly value claims, is doing.

We commend you for giving William K. Jaeger, Associate Professor, Department of Agricultural and Resource Economics, Oregon State University, a full hour, on February 26, 2007, to explain the fallacy of monopoly value claims, and why he and his colleague, Dr. Andrew J. Plantinga, have been writing for many months why “monopoly value” compensation is “invalid.” We describe here, in lay terms, the nature of monopoly value compensation, how it distorts Measure 37's compensatory purpose, and why it threatens all Oregonians.

A second-tier problem is that landowners may not transfer waiver development rights. This is wrong. If a landowner receives compensation in the form of a check, the cash obviously would be transferable. If compensation is in the form of a waiver, and if the value of the waiver is equivalent to the landowner’s loss, Measure 37 waiver rights should be just as transferable as cash.

In summary, as detailed below in Section III, we recommend the 2007 Legislature put Measure 37 back on the track of *fair and honest compensation for all claimants*, and corral the threat to Willamette Valley agriculture at the same time, by providing as follows:

- Whether in the form of a payment of money or in the form of a waiver, compensation should be based on losses landowners actually experienced;
- Waivers approved on that basis should be transferable;
- Compensation should be based on the proposal by Oregonians in Action submitted to the Oregon Supreme Court on December 5, 2005 (**Appendix A**), i.e. compensation should equal the reduction in value caused by the enforcement of a land use regulation at the time of its enforcement, plus interest paid on that loss, from the date of enforcement to the date the claim is filed;
- The value of a prohibited development right, like a farm homesite, is compensable, notwithstanding strongly rising farm land market values;
- The size of waivers should be based on loss of value, not an arbitrary “cap;”
- Compensation should take into account property tax reductions for farm and forest land received since 1974;
- A landowner who could build a house when a tract of land was purchased may build a house on that tract today, despite a later adopted land use regulation;

- Counties and DLCD should be given an extension of time to process the recent flood of claims;
- No “freeze” or “suspension” for filed claims or building permits demanding 2-9 home sites until a statewide vote on the Legislature’s changes to Measure 37;
- Filed claims demanding 2-9 lots will be given extensions to amend claims to show reduction in value, and that the waiver sought is equal in value to the owner’s loss; claims and permits may then proceed;
- For certain claimants who filed claims and incurred certain expenses, a tax credit could provide for recoupment of documented expenses up to \$5,000;
- The 28% of claims seeking subdivisions of 10-500 lots or more will be suspended pending voter approval of the Legislature’s adjustments to Measure 37; if the measure is approved, such claims may be amended to show reduction in value as recommended here;
- The Legislature should refer modifications to Measure 37 to the September 2007 ballot.

In developing this report, we acknowledge assistance provided by Henry R. Richmond, Executive Director, American Land Institute; professors Andrew J. Plantinga and William K. Jaeger, Department of Agricultural and Resource Economics, Oregon State University; and Dr. Sheila M. Martin, Director, and Erik Rundell, Graduate Research Assistant, Institute of Portland Metropolitan Studies, Portland State University.

II. THE PROBLEM OF MONOPOLY VALUE CLAIMS

On February 26, 2007 Professor William K. Jaeger spent an hour with the committee explaining *why* Measure 37 has gone off track: waivers are being approved on the basis of “monopoly” positions landowners never lost or owned, instead of on the basis of losses landowners actually experienced. He and his colleague, Prof. Andrew J. Plantinga, have forcefully written why this approach is “invalid.” We would say “phony.”

The need to correct this invalid approach is urgent. About 7,582 claims have been filed, including 3,500 in recent months. Of the 67% of claims which specify compensation, the total demanded is \$12.6 billion. About 1,700 claims have gone through ‘Step One’ of the process, i.e., verification of ownership date, determination of “some” loss, and a decision whether to pay or waive. Of those 1,700 claims, less than a few hundred have gone through ‘Step Two,’ the local approval needed to determine the type and size of a waiver. Only a few claims have received building permits. However, 5,800 other claims are in the pipeline, and the clock is running on Measure 37's 180-day time limit on *all claims*.

A. What is Monopoly Value Compensation?

Claim M119803 is one of 317 claims on 14,138 acres of Washington County’s 121,719 acres of farm land. The Washington County claims average 44.6 acres. Another 358 claims are on an additional 9,665 acres of mixed “Farm Forest” land; those claims average 27 acres in size. Another 39,636 acres of claims are on forest land.

Example: the claimant in M119803 acquired 54.08 acres of “prime” Class II Washington County farm land on October 12, 1965. The property was then worth about \$552 per acre, or \$29,852. In June, 2005, a neighboring farmer wrote the claimant offering to buy the 54 acres for \$12,500 per acre. That made the property worth \$676,000 in 2005. By comparison, a \$29,852 investment in the stock market in 1965 would have grown to only \$356,134 by 2005.

On February 16, 2005, claimant filed a Measure 37 claim saying farm zoning in the mid 1970s reduced the market value of the land. Claimant demanded \$9.5 million in compensation on the theory claimant’s property would be worth \$9.5 million if, in 2005, Measure 37 were to suddenly give claimant a highly lucrative “monopoly”¹ position, i.e., if Measure 37 were to *exempt* claimant’s farm land from zoning, but leave farm zoning *in place* on thousands of neighboring acres. In that situation, and assuming claimant’s land is cut into 97 half-acre lots, claimant’s 54 acres increases from \$676,000, an already handsome gain, to an astronomic \$9.5 million.

¹ This discussion of monopoly value draws on papers published by professors Jaeger and Plantinga supplied to the Committee, and on the discussion of Claim M119803 in *Oregon’s Public Investment in Conservation, Prosperity and Fairness: Reduced Taxation of Farm Land and Forest Land*, 1974 - 2004, February 2007, pp. 38-49, www.oregonpublicinvestment.com.

This flim-flammetry, of course, is not what Measure 37 is about. Measure 37 is about *reductions* in the value of a claimant's property caused by land use regulations that apply to the *claimant's property, not increases in the value of a claimant's property due to land use regulations that apply to other people's property*. Yet, on August 9, 2005, DLCDC initially approved Claim M119803, without determining what amount claimant actually lost. That is further flim-flammetry.

B. Why is Monopoly Value Invalid?

The fallacy of monopoly value compensation is that it gives claimants a windfall financial position which claimants never owned, and never lost. This is a perversion of Measure 37's compensatory purpose, and is wrong.

As discussed below, the M119803 claimant and other owners of farmland likely lost some quantifiable non-farm development rights due to county and state land use regulations adopted in 1973, 1975 and 1994. The exact amount would vary, depending on soil quality, proximity to town, etc. Whatever that loss may have been, however, before the 1973 regulations were imposed, *no owner was in the extraordinarily lucrative position where their land was unzoned, and thousands of surrounding acres were restricted to farm use*. Such a monopoly-type circumstance existed nowhere. Yet, officials have blithely approved hundreds of claims premised on non-existent monopoly positions, and officials are poised to approve thousands more.

C. Claim M119803 Illustrates the Fallacy of Monopoly Value Compensation

Applying to Claim M119803 the method of calculating compensation which Oregonians in Action proposed to the Oregon Supreme Court² shows claimant experienced something like a \$184,346 reduction in value, not \$9.5 million. A loss of \$184,346 would entitle claimant to a one-lot waiver -- not the 97-lot waiver claimant sought under a "monopoly" value rationale.

Before new county and state land use regulations were enforced in 1973, Washington County farm land was selling for about \$1,279/acre.³ Like other owners of the county's 100,000-plus acres of farm land, claimant was free to divide land into 2-acre homesites, the minimum size for a home on a septic tank and well. That meant a supply of about 50,000 farmland homesites existed, plus thousands of additional potential 2-acre homesites on close-in forest land. In competition with that

² On October 14, 2005, a state judge ruled Measure 37 was unconstitutional because the measure was susceptible to compensation awards so big they would not be reasonably related to Measure 37's compensatory purpose. To give the Oregon Supreme Court a way to reverse the lower court's ruling, on December 5, 2005, OIA proposed that compensation consist of the loss caused by enforcement of the regulation, plus interest on that loss from the date of the loss to the date the claimant files a claim. OIA has not explained why, with Measure 37 now upheld, it has taken a different position on the compensation issue in front of the Joint Special Committee on Land Use Fairness. A four-page excerpt from OIA's Supreme Court brief is in **Appendix A** (p. 42).

³ Interpolation of a 1969 - 1974 USDA Census of Agriculture average market values of farm land in Washington County (90.3% of 1974 value of \$1,416).

huge supply, claimant could have divided her land into 27 lots.

The huge supply of land developable for non-farm and non-forest uses meant that, with respect to the vast majority of properties, non-farm uses of farm land, and non-forest uses of forest land, added little, if anything, to the market value of farm land. Thousands of already-approved, ready-to-sell rural lots, created in the early 1900s, in “fruit tree” subdivisions in the North Willamette Valley, and thousands of “sagebrush subdivision” lots created in the 1950s and 1960s in Central and Eastern Oregon, remained unsold in the early 1970s. Even today, over three decades later, non-forest use of most industrial forest land has little, if any, nonforest use market value today; counties tax most industrial forest land on that basis today.

1973 County Regulations. In June 1973, Washington County applied a 38-acre minimum lot size (MLS) to most of the county’s farm land. That MLS prohibited division of claimant’s property, as claimant would need 76 acres to divide her property with no parcel smaller than 38 acres. The 38-acre MLS also likely limited the 54 acres to one dwelling. Considering the county’s vast supply of 2-acre rural homesites, how much, if any, did the county’s 1973 38-acre MLS reduce the \$1,279/per acre market value of farm land, whether owned by the claimant or others?

Assume that 10% of claimant’s \$1,279/acre value related to nonfarm residential use. The 38-acre MLS thus eliminated \$128/acre value, for claimant and for essentially all other nearby owners of farm land. Claimant’s 54-acre loss would have been \$6,942. Using a 10-year bond rate that incorporates compounding to calculate interest on that \$6,942 loss, from June 1973 to February 2005, brings total compensation for that loss to \$83,806.

1973 State Regulations. On October 5, 1973, Senate Bill 100 became effective. On that date, SB 100 limited the use of “prime” farm land, like claimant’s, to uses compatible with “the production of crops.” This restriction did not limit partitioning of claimant’s property beyond the county’s 38-acre MLS, but probably did limit the type of dwelling that could be built on the “prime” farm land to a dwelling “customarily provided in conjunction with farm use.”

1975 State Regulations. As of January 25, 1975, LCDC’s Goal 3 allowed “farm” dwellings on the same basis as the October 1973 limitations, but also allowed *nonfarm* dwellings on “agricultural land.” Hence, with respect to dwellings, Goal 3 relaxed limitations. LCDC’s Goal 3 also contained an MLS standard: “appropriate for the continuation of the commercial agriculture in the area.” However, that standard did not limit claimant’s ability to partition beyond the county’s 1973 38-acre MLS.

1994 State Regulations. LCDC’s March 1, 1994 \$80,000 gross income test for a farm dwelling may or may not have prevented a farm dwelling on claimant’s 54-acre property. Assuming it did, the reduction in value, in 1994, would be equal to one unimproved farm land homesite. In 1994,

an unimproved rural homesite in Washington County was worth about \$55,000.⁴ Interest on that \$55,000 loss from March 1, 1994 to February 16, 2005 brings compensation for the 1994 reduction in value to \$100,540.

Total compensation due the claimant in M119803 is \$184,346 -- the sum of the 1973 reduction of \$83,803, and the 1994 reduction of \$100,540. If claimant was provided compensation in the form of a waiver, instead of cash, a waiver roughly equal to claimant's \$184,346 loss would have been one homesite⁵ -- not the 97 homesites DLCD initially approved. If the above assumptions are off by a factor of 2 or 3, claimant's waiver would be 2 or 3 homesites, not 97.

The difference between the \$9.5 million claimant demanded and claimant's actual \$184,346 loss -- \$9,310,654 -- is a windfall, 50 times more than what she lost. This is not merely invalid. It is as phony as a three dollar bill.

Claimant contends market demand for half-acre homesites would push the value of claimant's 54 acres up to the \$9.5 million windfall she demands. But, where would that demand come from? By exempting claimant's land from farm zoning, Measure 37 *deflects* demand from the thousands acres of still-regulated land owned by claimant's neighbors, and *transfers* that demand to claimant's 54 acres. That is, Measure 37 gives claimant a \$9,310,654 windfall because Measure 37 transfers to claimant's suddenly "scarce" 54 acres, the modest amounts of foregone market value attributable to nonfarm uses on thousands of acres, which uses the 1973 and 1994 regulations disallowed.

Another stark indication of the unreasonable nature of claimant's demand is that \$9.5 million is **\$8.6 million**, or 11.3 times, **more** than what would be due claimant in 2005, if, in 1973, the government had *entirely taken* claimant's 54 acres to build a park, but failed to compensate claimant.⁶ If, in 2005, claimant demanded compensation for that total 1973 taking of her 54 acres, her loss would have been \$69,168 (\$1,279/acre x 54.08). Interest on that loss, from 1973 to 2005, would bring compensation to \$838,055 -- not \$9.5 million.

⁴ John Krautscheidt, Farm Property Supervisor, Washington County Appraisers Office, 1963 - 1997, estimated \$50,000 - \$60,000 (Phone conversation, February 14, 2007). If improved with well and septic tank, including permit fee costs, value would have been \$15,000 more.

⁵ According to the Rural Property Record No. R741380, Washington County Assessor's Office, the 2006 market value of an improved, .9 acre homesite in the vicinity of claimant's property was \$165,000. To make up the \$19,346 difference between claimant's loss of \$184,346 and the \$165,000, the county could waive development fees, or write a check, or both.

⁶ OIA's 12/5/05 brief proposed a similar 32-year-old hypothetical to the Oregon Supreme Court, and came up with the same type of result, stating to the court, "That is all that is required under Measure 37." (**Appendix A**, at p. 43.)

D. Monopoly Value Compensation Cancels Taxpayer Investment in Future Farm Income

Claimant's \$9.3 million windfall also shows how monopoly value claims threaten, in some counties, to cancel a \$4.9 billion investment Oregon taxpayers have made in future income from farming and forestry. The 1973 legislature mandated higher urban and suburban taxes to finance tax reductions for farm and forest land owners, in consideration of land use restrictions (see note 1). In claim M119803, and others like it, *Measure 37 transfers to the property of a Measure 37 claimant development rights which urban and suburban taxpayers in Washington County have, since 1974, at least partially compensated landowners to forego -- cumulatively \$419 million dollars in that county alone. That is grossly unfair.*

Assume demand for 96 lots is being transferred from 96 other 54-acre parcels, or 5,130 acres, surrounding claimant's 54 acres. At \$9,310,654 that is \$1,815 per acre of foregone development value which Measure 37 revives and transfers to claimant's property. But the average cumulative tax reduction on farm land financed by Washington County's urban and suburban taxpayers since 1974 has been \$3,448 per acre.

The purpose of those \$3,448/acre payments was to eliminate development that would interfere with productive use of prime farm land, so Washington County farm land could continue to annually generate hundreds of millions of dollars in future farm income-- *\$275 million in 2005* alone, the proverbial "Goose that Lays the Golden Egg." *For two reasons, Measure 37 is a scam on county tax payers. First*, Measure 37 abruptly cancels that taxpayer investment, and the future income that investment otherwise would have helped secure. *Second*, Measure 37 allows claimants, quite unknowingly, to effectively appropriate to themselves not just \$3,440/acre worth of development rights which taxpayer payments previously have extinguished, but, also the \$3,448 per acre investment county taxpayers made to extinguish those rights.

E. Compensation Based on Loss is Fair as Well as Honest

Compensation of \$184,346 may seem disappointingly modest to a landowner who, from out of the blue, had \$9.5 million dangled in front of her. However, such seemingly modest compensation is fair as well as honestly calculated.

1. Some Compensation Already Paid

Compensation of \$184,346 is perhaps high, not low, given that tax reductions have already significantly compensated claimant for restrictions on nonfarm uses. Since 1974, urban and suburban taxpayers in Washington County have paid \$419 million more in property taxes to finance \$419 million in tax reductions for farm land. County-wide, those reductions, 1974 - 2004, averaged *\$3,448 per acre (Table 1)*. If claimant in M119803 received the average tax reduction Washington County taxpayers already would have compensated claimant \$186,468 (54.08 acres x \$3,448/acre). That is, slightly more than the \$184,346 in compensation which claimant would have received under Measure 37.

Any “offset” for cumulative property tax reductions would be far less in most other counties, because the average cumulative per acre reduction statewide is \$245/acre, not the \$3,448 in Washington County, or \$3,007 in Clackamas County (see *Table 1*).

2. Farm Land Has Been a Successful Investment

The balance sheets of farm land owners have strengthened under farm zoning, not weakened. The year 1964 is close to when many Measure 37 claimants acquired title who later challenged LCDC’s 1975 farm and forest regulations. The year 1964 is also when USDA reported average market value of farm land, for each Oregon county, based on strong statistical samples. *From 1964 to 2002, in the 21 Western Oregon and Central Oregon counties where 94% of Measure 37 claims have been filed statewide, the market value of farm land has risen faster than the stock market*⁷. This fact is well understood by farmers -- but few others.

F. How Monopoly Value Claims Threaten Commercial Agriculture

Research by the Institute for Portland Metropolitan Studies, Portland State University, and by the Oregon Department of Agriculture shows that Measure 37 claims threaten Oregon agriculture, a linchpin of Oregon’s economic well-being. This is true in the Willamette Valley, as well as in Jefferson County in Central Oregon, Jackson County in Southern Oregon, and Hood River County in the Gorge.⁸

1. The Portland State University and Oregon Department of Agriculture Research

PSU. Statewide, PSU’s Measure 37 data base shows the 7,582 claims filed to date mainly demand subdivisions on farm and forest land in the Willamette Valley. Of the 7,582 claims:

- 5,419 claims specify land type by current zoning. Of those 5,419 claims, 4,582, or 84.5%, are on farm or forest land, with 51.1% on farm land.
- 4,396, or 60.6%, are in the nine Willamette Valley counties. Those counties have 10% of the state’s farm land, but, in 2005, generated \$2.1 billion, or 48.8% of the state’s total farm sales of \$4.3 billion.

⁷ *Oregon Public Investment*, Table 16, p. 68 (n. 1)

⁸ Measure 37 poses no threat to agriculture in Eastern Oregon. Fourteen Eastern Oregon counties -- Baker, Gilliam, Grant, Harney, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco and Wheeler -- have 11.9 million acres, or 76.4%, of Oregon’s 15.6 million acres of farm land. However, those 14 counties have only 469, or 6.5% of the 7,260 claims filed statewide. In four counties, Harney, Morrow, Sherman and Wheeler, with 3.6 million acres, or 23% of the state’s total, a total of three claims have been filed.

TABLE 1: Farm Land Tax Reductions, Farm Sales, and Measure 37 Claims, by County

			Tax Reductions 1974 - 2004		Reduction per Acre 1974 - 2004	Farm Sales 2005		Measure 37 Claims (as of 3/12/07)		
County	Acres	% of Total	Amount	% of Total	Amount	Amount	State Rank	#	State Rank	% of Total
Marion	292,719	1.9%	\$439,052,219	11.5%	\$1,499.91	\$539,629,000	1	489	5	6.5%
Washington	121,719	0.8%	419,720,634	11.0%	3,448.28	274,885,000	3	902	2	11.9%
Clackamas	132,135	0.8%	397,287,476	10.4%	3,006.69	361,918,000	2	1,048	1	13.9%
Umatilla	1,325,832	8.5%	242,666,270	6.3%	183.03	274,763,000	4	47	27	0.6%
Linn	356,284	2.3%	223,708,235	5.8%	627.89	248,812,000	6	494	4	6.5%
Yamhill	154,012	1.0%	158,422,183	4.1%	1,028.63	264,038,000	5	454	6	6.0%
Klamath	593,888	3.8%	154,155,993	4.0%	259.57	200,749,000	9	103	22	1.4%
Lane	167,300	1.1%	153,440,602	4.0%	917.16	117,239,000	11	412	7	5.4%
Malheur	1,306,165	8.4%	138,061,644	3.6%	105.70	206,426,000	8	13	30	0.2%
Polk	173,890	1.1%	134,792,262	3.5%	775.16	130,052,000	10	270	9	3.6%
Morrow	996,988	6.4%	114,482,331	3.0%	114.83	233,396,000	7	0	-	0.0%
Jackson	207,505	1.3%	112,459,644	2.9%	541.96	76,241,000	16	574	3	7.6%
Benton	105,079	0.7%	89,734,842	2.3%	853.98	105,378,000	13	140	17	1.9%
Baker	861,994	5.5%	88,086,233	2.3%	\$102.19	56,768,000	20	139	18	1.8%
Wasco	768,636	4.9%	86,316,984	2.3%	112.30	58,762,000	19	49	26	0.6%
Union	494,843	3.2%	83,353,788	2.2%	168.45	47,961,000	22	62	25	0.8%
Harney	1,457,614	9.3%	78,191,953	2.0%	53.64	68,399,000	17	1	33	0.0%
Multnomah	28,697	0.2%	69,346,574	1.8%	2,416.48	77,744,000	14	187	14	2.5%
Jefferson	437,653	2.8%	61,713,232	1.6%	141.01	42,985,000	25	138	19	1.8%
Wallowa	657,544	4.2%	60,422,939	1.6%	91.89	43,519,000	24	31	28	0.4%
Deschutes	166,572	1.1%	59,311,292	1.6%	356.07	23,258,000	33	185	15	2.4%
Lake	760,819	4.9%	55,870,729	1.5%	73.44	55,485,000	21	5	31	0.1%
Grant	894,672	5.7%	45,517,274	1.2%	50.88	30,229,000	29	16	29	0.2%
Douglas	297,194	1.9%	42,971,616	1.1%	144.59	76,948,000	15	258	10	3.4%
Hood River	23,506	0.2%	35,630,212	0.9%	1,515.82	67,008,000	18	233	11	3.1%
Crook	763,804	4.9%	33,539,045	0.9%	43.91	42,624,000	26	66	24	0.9%
Josephine	23,194	0.1%	31,789,821	0.8%	1,370.63	32,009,000	28	319	8	4.2%
Curry	43,143	0.3%	31,072,262	0.8%	720.21	25,698,000	32	117	20	1.5%
Columbia	44,188	0.3%	27,705,547	0.7%	626.99	32,970,000	27	182	16	2.4%
Tillamook	31,791	0.2%	27,191,182	0.7%	855.32	107,717,000	12	88	23	1.2%
Gilliam	693,371	4.4%	26,306,963	0.7%	37.94	27,346,000	30	1	33	0.0%
Lincoln	14,107	0.1%	23,939,744	0.6%	1,697.04	18,029,000	34	198	13	2.6%
Coos	74,054	0.5%	22,179,053	0.6%	299.50	45,846,000	23	230	12	3.0%
Sherman	454,219	2.9%	21,939,640	0.6%	48.30	26,060,000	31	0	-	0.0%
Clatsop	16,347	0.1%	21,638,246	0.6%	1,323.64	12,089,000	35	109	21	1.4%
Wheeler	655,370	4.2%	13,290,931	0.3%	20.28	11,488,000	36	2	32	0.0%
Total	15,596,848	100.0%	\$3,825,309,596	100.0%		\$4,064,468,000		7,562		100.0%
Average					\$245.26			210		

Source: Oregon's Public Investment in Conservation, Prosperity and Fairness, Table 3, (n. 1); Oregon Agricultural Statistics Service, OSU Extension Service, "Oregon Agricultural Facts and Figures," May 2006

- ***By 2 - 1, farm and forest land claims demand subdivisions.*** Statewide, of the 3,238 farm and forest claims which specify demanded use by type, 68.6% demand subdivisions, 29.7% partitions, and 1.8% other types of non-conforming uses.

Four North Willamette Valley counties -- Marion, Clackamas, Washington and Yamhill -- rank 1, 2, 3, and 5, respectively, among the state's 36 farm-producing counties. In 2005, on only 4.6% of the state's farm land, those four counties generated 33% of the state's \$4.3 billion in farm sales. ***These four counties also have 40% of the state's Measure 37 claims, and have received \$1.7 billion, or 40%, of farm and forest land tax reductions, statewide since 1974.***

Linn County, Oregon's sixth biggest farm producing county, has 494 claims, fourth highest in the state. Lane County, the eleventh top producing county, has 412 claims, sixth highest.

Jackson and Hood River counties show Measure 37 threatens agriculture outside the Willamette Valley. Jackson County has 574 Measure 37 claims, third highest statewide. Those claims demand \$585 million in compensation. County taxpayers have paid \$112 million since 1974 to keep 207,000 acres of Jackson County farm land in production, and \$83 million to keep forest land in production. To the extent Measure 37 allows non-farm and non-forest uses that undermine farming and forestry, Measure 37 will cancel that investment.

In Hood River County, Measure 37 claims are on 2,993 acres, or 13%, of the county's 23,506 acres of farm land. The "shadow effect" of these claims would threaten productive use of 9,000-15,000 additional acres, over half Hood River County's farm land. County farm sales totaled \$67.4 million in 2005. At \$2,851 per acre in 2005, coming off only 23,506 acres, Hood River County's orchards rank second only Tillamook County (\$3,388 per acre, on 31,791 acres) in terms of productivity per acre. To the extent Measure 37 allows, non-farm and non-forest uses that undermine farming and forestry, Measure 37 will cancel that investment.

Oregon Department of Agriculture maps⁹ show how claims in PSU's Measure 37 data base threaten agriculture. The maps show subdivisions scattered throughout commercial farming areas of Washington, Clackamas, Yamhill, Marion, Linn, Hood River and Jefferson counties. More important than the total number of claims and the total amount of acreage, as Oregon Department of Agriculture's Jim Johnson explained to the Committee, is the impact which new nonfarm development ***on claim acreage*** has on farm investment on ***surrounding acreage***. A large new subdivision in the middle of farm areas threatens agriculture by threatening farm investment on 3 - 5 times the amount of the claim acreage. If farmers fear new subdivisions across the fence will prevent them from carrying out farm practices, farmers will stop borrowing long-term against their land to invest in equipment, structures, etc. Of, course a new subdivision across the fence compromises a farmers' ability to amortize an ***existing*** investment.

⁹

These maps are available online at: <http://www.oregon.gov/ODA/NRD/m37.shtml>.

2. Monopoly Value Claims are the Reason Measure 37 Threatens Agriculture

There is no need for us to belabor Measure 37's threat to agriculture; PSU's and ODA's research has already done that. *Our point is the reason for that threat: the large subdivisions that result from phony monopoly value compensation, instead of more modest waivers based on what owners actually lost.*

In Washington County, for example, 155 claims, involving 3,470 acres of farm land, seek partitions of 1-3 lots. Farming probably could co-exist with most of those claims. However, another 278 claims involving 16,087 acres of farm land, demand subdivisions averaging 58 acres. These subdivisions would have a “shadow effect” or an *additional* 48,000 - 80,000 acres, or, together with the 16,087 acres, the actual Big Picture impact on agricultural land in the Willamette Valley might be 50% - 80% of the farm acres, or 40% - 65% of the county's 121,719 acres of farm land.

Statewide, 85.6% of subdivision lots demanded by Measure 37 claims statewide are on subdivisions demanding 10 - 500+ lots. On *claims of all types of land*, 3,183, or 46.2%, of claims specify number of lots demanded and total acres. Of these 3,183 claims, 41% seek 1 - 3 lots, but involve only 2.6% total acres and demand only 4.9% of total lots. In contrast 28% of claims seeking 10 - 501 + lots involve 81% of total claims and 86% of total lots.

Table 2: Statewide, Measure 37 Claims by Size, Acre and Number of Lots

Lots	Claims	% Claims	Acres	% Acres	Lots	% Lots
1 - 3	1,288	40.5	4,938	2.6	2,904	4.9
4 - 9	978	30.7	50,632	26.4	5,561	9.5
10 - 500+	<u>917</u>	<u>28.8</u>	<u>136,571</u>	<u>71.1</u>	<u>50,280</u>	<u>85.6</u>
Total	3,183	100	192,141	100.1	58,745	100

Source: Portland State University, Institute for Portland Metropolitan Studies, Measure 37 database, www.pdx.edu/ims/m37database.html

In terms of lots demanded, farm and forest land claims statewide are about the same as claims on all types of land. However, **Table 3** shows a far higher percent of *acreage* -- 20.8 -- in the 1 - 3 lot class of farm and forest claims, compared to 2.6% in the 1 - 3 lot class in **Table 2**. Statewide, of the 6,518 claims involving only *farm and forest land*, 2,180, or 33.5%, specify acres involved and the number of lots demanded. Of these 2,180 claims, 832, or 38.2%, in the 1 - 3 lot class, involve 20.8% of the acres and 4.4% of the total lots demanded. In contrast, 683, or 31.3%, of the claims in the 10-500+ lot class, *involve 56.1% of the total acreage, and 86.4% of the lots demanded.* The latter is almost identical to **Table 2**.

Table 3: Statewide Claims with Farm, Forest and Farm/Forest Zoning

Lots	Claims	% Claims	Acres	% Acres	Lots Reported	% Lots
1 - 3	832	38.2	34,914	20.8	1,775	4.4
4 - 9	665	30.5	38,738	23.1	3,692	9.2
10 - 500+	<u>683</u>	<u>31.3</u>	<u>94,177</u>	<u>56.1</u>	<u>34,500</u>	<u>86.4</u>
Total	2,180	100	167,829	100	39,967	100

Source: Portland State University, Institute for Portland Metropolitan Studies, Measure 37 database, www.pdx.edu/ims/m37database.html

The data in **Tables 2** and **3** must be used conservatively. These tables reflect 41% and 33% samples, respectively, of the class of claims involved in each table. In addition, no claim, however large or small, and whether initially approved or not, can be assumed to be based on actual reduction in value.

Still, the 38%- 40% of claims in the 1 - 3 lot class, with the exception of unproven claims on “high value” land, seem to be what Oregon voters had in mind when they approved Measure 37. Likewise, the 29-31% of claims involving subdivisions of 10 lots or more, involving 86% of all lots demanded in each table, likely have little to do with compensation, and a great deal to do with windfalls.

The 31% of claims involving 4 - 9 lot subdivisions are “in between.” On the one hand, these claims are too likely to be unsupported by proper proof of loss, and involve far too much acreage -- 109,593 acres (50,632/46.2%=109,593) -- to be treated the same as the 1 - 3 lot class. On the other hand, the time and expense landowners have put into these claims, and the age of many claimants, argues against a six or eight-month freeze until a statewide vote, which is how the 10 - 500 lots should be handled. As recommended below, claimants in the 4 - 9 lot class should be allowed to amend existing claims now, to show conformance with proper standards, and to then proceed. That is fair to both these claimants and to their neighbors. It also respects and carries out voter intent to compensate for losses caused by land use regulations.

III. RECOMMENDATIONS

Compensation under Measure 37 should equal the reduction in value the land owner experienced. Whether in the form of a payment of money, or in the form of a waiver, compensation less than the landowner's loss is unfair to the landowner. Likewise, a waiver greater in value than the landowner's loss is not "compensation" but a windfall, and unfair to the public, just as in the law of eminent domain.

A. Reduction in Fair Market Value

So that waivers are both fair and honest, the 2007 Legislature should take three key steps:

First, uphold Measure 37's basic requirement that government must compensate landowners when a change in zoning causes a reduction in market value;

Second, compensation should be in one of two forms:

- a payment of money equal to the proven loss,
- or a waiver of regulations to allow a use, the value of which also equals the loss.

Third, make waivers approved on this basis fully transferable.

1. Compensation Defined

The Legislature should adopt the proposal OIA formally submitted to the Oregon Supreme Court on December 5, 2005, that government compensate the landowner for a loss caused by enforcement of a land use regulation, plus interest on that loss, from the time enforcement of the regulation first occurred, to the date the landowner files a claim.

2. Includes Loss of Development Rights Even Though Market Value of Land Is Rising

The Legislature should adopt the point Sen. Larry George made January 26 in discussions with Professor William K. Jaeger: A land use regulation can cause a reduction in the market value of property by prohibiting a use even though the market value of the farm land the claimant owns has risen in value. But for that prohibition, the market value would have been higher still. That is a reduction in value Measure 37 should compensate. The question is, what was the market value of a prohibited use (e.g., a loss of a homesite in 1994 due to DLCD's \$80,000 rule), and what would be the interest on that loss from 1994 to the date the claimant filed a claim. This is an important point, given that, since 1964, farm land values, even restricted by zoning, have risen faster than the S & P 500 -- i.e., this may be the biggest loss a typical farm land owner experienced.

3. Offset For Tax Reductions

We agree with Senate Bill 588 (2007) that compensation under Measure 37 should take into account property tax reductions which farm land and forest land subject to a Measure 37 claim has received since 1974. After the land use law (Senate Bill 100) was passed, the Legislature mandated property tax reductions for farm and forest land owners in consideration of anticipated land use restrictions. *Since then, urban and suburban taxpayers paid higher taxes to finance \$4.9 billion in farm and forest land tax reductions.* In many cases, tax reductions likely will not completely offset reductions in value proven by claimants. But to the extent the farm and forest land reductions have been received, double compensation would be unfair to taxpayers.

Apart from that, higher tax payments were an investment in future farm, food processing and forest products income -- about \$17 *billion* in 2005. Measure 37 cancels that investment, if, in a given county, subdivisions prevent farmers from carrying out farm practices. That is also unfair to taxpayers.

B. Waivers

The government body which adopted, or required the adoption of, a land use regulation which reduces fair market value has the duty to compensate. The Legislature should provide that such duty includes the responsibility to approve the type and scale of the “waiver” use.

1. The Value of A Waiver Use May Not Exceed the Value of A Loss

With the exception of item 3, “Homestead Right,” below, we recommend the Legislature provide that the dollar value of a waiver development right must be roughly equivalent to the landowner’s loss. Measure 37 can not be compensatory if Measure 37 claimants can demand waivers for *any* use allowed when they bought their property, when the value of that use would far exceed the loss the owner experienced (See item 4, below).

2. No Cap on Waivers

An arbitrary cap on the size of waiver is inconsistent with the basic principle of compensating for actual losses. If the landowner’s loss is the equivalent to the value of one homesite, the landowner gets one homesite, not three. If the landowner’s loss is equal to the value of ten homesites, the landowner gets ten, not three.

3. Homestead Right

A claimant who was able to build a house on a tract of land when the owner bought the land may build a house on that tract today, notwithstanding a later-adopted land use regulation. The right to build that house is transferable. We recommend this as a minimum level of relief under a waiver - even if the claimant cannot prove a loss equal to the value of a homesite.

C. Transferability

Measure 37 has labored under two burdens -- many waivers are too big, and no waiver, no matter how small, is transferable to a third party. As long as many waivers are too big, resolution of the transferability issue, even for small claims, has been politically impossible. The Legislature can break this logjam by:

- Limiting the size of waivers to the loss a landowner actually experienced, and
- Making such waivers transferable.

D. Initially Approved Claims

A difficult part of putting Measure 37 back on track is treating landowners fairly who (1) have filed Measure 37 claims, (2) have received 'Step One' (i.e., verification of ownership, finding of "some" reduction in value, and decision to give waiver or write a check), (3) have received 'Step Two' approval (determination of type and size of waiver in local land use approval), or (4) have both Step One and Step Two approval, but no vested right. Our recommendations on these points are spelled out below.

1. Vested Claim Rights

A few claimants have obtained final approval of their Measure 37 claim, a land use approval, and building permits, and have spent significant sums to commence development in reliance on permits. Development rights for such claimants have been vested. That's water over the dam, regardless of the impact.

2. No Suspension of Claims for Demands of 2 - 9 Lots

We do not believe it is necessary to suspend or freeze the claim approval process for claims demanding 1 - 9 lots until voters approve the Legislature's adjustments to Measure 37. These claims comprise 71.2% of all claims, but only 14% of lots demanded. These claims are less likely to be based on spurious monopoly value demands, though few are likely to be supported by proof of loss. In the case of 1-3 lot claims, the claims are also less likely to have major negative impacts,.

To proceed, claims with either Step One approval or Step Two approval but without a vested right, and which seek either (1) 2 - 3 lots on "high value" land, or (2) 4 - 9 lots on any class of land -- such claims must be amended to actual loss, as described in Section III A and B.

3. Suspend Claims Demanding 10 - Lots or More

Claims demanding 10 - 500 lots should be suspended until the voters say "Yes" or "No" to the legislative referral. These claims include only 23.8% of claims, but demand 86% of lots. These claims are most likely to be based on a spurious monopoly value rationale. Also, these claims are the most likely to cause major, irreversible harm to farm and forestry operations.

4. Claims Seeking 1 Homesite

The holder of a valid claim, i.e., the current owner who owned before regulations took effect, with Step One approval for a waiver on any class of land should be given immediate approval and transferability without further proof of reduction in value.

5. Claims Seeking 2 - 3 Homesites on Non-High Value Land

Claims with Step One approval issued prior to January 1, 2007, involving two or three lots on farm land that is not “high value,” or two or three lots on forest land that is lower quality than Class IV, should be given immediate approval and immediate transferability without further proof of reduction in value. Claim applications should be amended to show farm soil classifications, and forest site productivity class.

6. Claims Seeking 2 - 3 Dwellings on High Value Land

Claims involving high value land shall be processed when the claim has been supplemented with information showing reduction in value, and that the waiver sought is roughly equivalent to the landowner’s loss, both as proposed here.

7. Claims Seeking 4 - 9 Lot Waivers

Claims may be supplemented to show the reduction in value the claimant experienced, based on the value of property before enforcement of the regulation, and the value of the property after said enforcement, plus interest. Such calculation of reduction in value would include the value of any specifically prohibited development right, notwithstanding a general rise in farm land values. The starting point of proof of reduction in value is the market value of the property at the time the regulation complained of was enforced.

Statewide, claims demanding 4 - 9 lots comprise 30.7% of total claims, and 9% of lots demanded, but, in the Willamette Valley, 25.8% of total claim acreage. [need state acreage number]

8. Other Previously Approved Claims

For other initially-approved waivers, for filed claims without initial approval, and for all future claims, a waiver is transferable if it is supported by:

- A determination of reduction in value, as we recommend, and
- A determination that the waiver use is roughly equivalent in value to compensation that otherwise would have been paid.

9. Compensate for Reliance

An unknown number of claimants have changed their position in reliance on DLCD's interpretation of Measure 37. These claimants have variously spent money for surveys, permits, legal advice etc. Development rights under an initial approval waiver are not vested because land use approvals determining the type and size of the waiver have not been obtained, and because the owner has not physically begun substantial development on the site. On January 23, 2007, Asst. Attorney General Richard M. Whitman testified to the committee that the Legislature is not constitutionally barred from adjusting Measure 37 with the result that some claims do not go forward. To say "tough luck" to claimants in such circumstances will understandably seem unfair. Accordingly, for claimants who filed before January 10, 2007, and who receive no compensation, we recommend the Legislature create a tax credit making such claimants eligible for income tax credits to recoup expenses incurred prior to January 10, 2007, up to a limit of \$5,000.

E. Extension of Time

The Association of Oregon Counties has presented a clear need for an extension of the 180-day deadline for processing claims. We recommend no specific amount.

F. Revocable Trusts

We do not believe landowners should be stripped of Measure 37 rights because there has been a transfer to a revocable trust, provided the transfer created no new irrevocable ownership interests.

G. Waiver of Statute

Ambiguity in Measure 37 has allowed litigation over the question of whether DLCD may waive a statute (e.g., regarding subdivisions or partitions) to allow an owner to undertake an approved Measure 37 waiver. The Legislature should end that debate by making clear DLCD has such authority.

H. Future Operation of Measure 37

We do not support curtailing Measure 37's *future* operation. The current controversy on Measure 37 has been with respect to an essentially fixed number of claims arising from Measure 37's *retroactive* effect, i.e., claims attacking regulations adopted, e.g., 32 years ago. Those claims will gradually wind down to zero, however they are resolved.

Measure 37's future impacts will be broader, and more enduring, and often easier to administer. Future land use regulations could include forest practice regulations, "environmental overlay" zones, restrictions on streamside development, or new LCDC goals. We believe the voters intended Measure 37 should apply to such future limitations, and that Measure 37's drafters and sponsors had a similar intent.

Unlike claims involving regulations adopted 32 years ago, the question of whether **future** regulations reduce fair market value can be readily answered by reference to **current** comparable sales information. Future Measure 37 claims thus will not present the kind of how-do-we-calculate-compensation problems now complicating Measure 37's administration.

I. Burden of Proof

The Legislature should make clear the burden of proving reduction in value is on the claimant. With the 2007 Legislature clarifying what "compensation" means, the Legislature should direct LCDC to adopt *rules (1) clarifying what information a claimant must include in an application to prove they have experienced a reduction in value. It is normal and reasonable to place the burden of proof on a claimant.* The claimant, not county or state officials, has the information needed for a decision, or is at least in a better position to obtain that information. *Claims without adequate information should be dismissed, with permission to refile.*

J. \$80,000 Rule

Complaints about LCDC's \$80,000 income test for farm dwellings were expressed during the 2004 campaign. Measure 37 effectively repeals the \$80,000 income test for owners who bought before LCDC adopted the rule in 1994. To remove a pointless and controversial obstacle to orchard and vineyard investment, we recommend the \$80,000 rule be modified for owners, specified below, who bought *after* enactment of the rule, and who have made substantial and fixed farm investments.

No one will spend \$400,000 to establish a vineyard -- in addition to land costs -- as a gimmick to get a dwelling permit for a farm dwelling. If an established vineyard, on an objective basis defined by rule, is likely to produce \$80,000 gross, and the owner thus will be entitled to a permit in three years, *no land conservation purpose is served by making the landowner wait.* The Legislature should direct LCDC to adopt a rule substantially providing as follows:

- A landowner with mature nut or fruit orchard trees on enough agricultural land likely to gross \$80,000 shall not be required to wait for three years for the trees to actually gross \$80,000 to apply for a farm dwelling.
- A landowner with an established wine grape vineyard on enough land likely to produce \$80,000 gross shall not be required to wait three years for the vines to actually gross \$80,000 to apply for a farm dwelling.

The Homestead Right we recommend (p. 15) should enable any owner of farm land to build a farm dwelling who acquired title to land prior to LCDC's 1994 adoption of the \$80,000 income test, provided the owner could build a dwelling at the time the owner acquired title.

K. Referral to the Voters

We believe strongly the Legislature should give Oregon voters the final word on the implementation of Measure 37. In general, we believe it is the role of the Legislature to resolve

tough issues itself. However, Measure 37 is exceptional. In 2000 and in 2004 strong majorities established the principle that government must compensate landowners if land use regulations reduce the market value of property. ***We respect the electoral process.*** Referral is the best way for the Legislature to give Oregonians the opportunity to validate their earlier electoral intent.