

Measure 37:  
Is it Doing What Oregon Voters Wanted?

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Measure 37 was enacted in 2004. Measure 49, on the November 6, 2007 ballot, would modify Measure 37. The purpose of this report is to help Oregonians understand what Measure 37 would do, in each of Oregon's 36 counties, if voters do not adopt Measure 49. As explained at pages 3 - 6, this report's findings are reasonable estimates, not precise determinations.

The mission of the American Land Institute is to research land use policy issues, and to disseminate the results to the public. We thank John D. Gray, Portland, Nancy B. Gerhardt, Portland, the Rose E. Tucker Charitable Trust, Portland, Edmund Hayes, Jr., Portland, and Milne Real Estate, Portland, whose generous support made this work possible.

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Craig M. Chisholm  
Chairman

# CONTENTS

CONTENTS .....	i
TABLES .....	ii
APPENDICES .....	iii
I. SUMMARY .....	1
II. ABOUT THE NUMBERS .....	3
A. Database of Analysis .....	3
B. Method to Assess Claims with Unspecified Data .....	4
III. STATEWIDE .....	7
A. Results Proponents Predicted .....	7
B. Results Opponents Feared .....	7
IV. BY REGION .....	11
A. Willamette Valley .....	11
B. Central Oregon .....	14
C. Eastern Oregon .....	15
D. Southern Oregon .....	16
E. Oregon Coast .....	17
V. NINE WILLAMETTE VALLEY COUNTIES .....	19
A. Subdivisions .....	19
B. Rural Partitions and Non-Divisions .....	19
C. Urban Claims .....	20
VI. INTERPRETING INITIATIVE MEASURES: VOTER INTENT AT RISK ..	23
A. Why So Many Big Subdivisions? .....	23
B. Why Aren't Waivers Transferable? .....	27
VII. RESEARCH REFUTES MEASURE 37 JUSTIFICATIONS .....	28
A. The Value of Regulated Farm Land Has Risen Enviably .....	28
B. Legislature Provided Compensation for Rural Landowners .....	30
VIII. MEASURE 37: AS IS, OR AS MODIFIED? .....	33

## TABLES

Table 1:	Classification of Claims as Reported . . . . .	4
Table 2:	Oregon, by Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	8
Table 3:	Subdivisions on Farm Land, by County . . . . .	9
Table 4:	Subdivisions on Forest Land, by County . . . . .	10
Table 5:	Claims by Region . . . . .	11
Table 6:	Willamette Valley Counties, Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	12
Table 7:	Central Oregon, Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	14
Table 8:	Eastern Oregon, Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	15
Table 9:	Southern Oregon, Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	16
Table 10:	Oregon Coast, Subdivisions, Partitions, and Non-Divisions, Farm and Forest Land, Urban Areas . . . . .	17
Table 11:	Stimson Lumber Company Claims . . . . .	18
Table 12:	Claims by Type of Land Division, Willamette Valley Counties . . . . .	19
Table 13:	Farm Land Subdivisions, Willamette Valley Counties . . . . .	20
Table 14:	Forest Land Subdivisions, Willamette Valley Counties . . . . .	21
Table 15:	Non-Divisions by Zone and Acreage, Willamette Valley Counties . . . . .	22
Table 16:	Regional Growth in Farm Land Market Value per acre, 1964 - 2002 . . . . .	29
Table 17:	Major Oregon Public Investments, by Date, Cost and Present Value . . . . .	31
Table 18:	Farm and Forest Land Tax Reductions and Measure 37 Claims, Five North Willamette Valley Counties . . . . .	31

## APPENDICES

- A. Summary of Allocation of Measure 37 Claims, Oregon
- B. Willamette Valley
- C. Benton County
- D. Clackamas County
- E. Lane County
- F. Linn County
- G. Marion County
- H. Multnomah County
- I. Polk County
- J. Washington County
- K. Yamhill County
- L. Hood River County
- M. Jackson County
- N. About the Authors

## I. SUMMARY

When voters considered Measure 37 in 2004, what it would do was a guessing game. Moreover, arguments made to justify the measure were untested. Today, three years and 7,462 claims later, what Measure 37 would do is increasingly clear. In addition, new research shows two key Measure 37 justifications were myths.

*The Guessing Game Is Over.* The 7,462 claims show Measure 37 would do some that proponents predicted, more that opponents feared, and some that surprised everyone:

- 3,153 (42%) seek 1 - 3 homesites, what proponents predicted Table 2;
- 4,309 (58%) demand subdivisions, what opponents feared;
  - 2,854 on 364,462 acres of farm land averaging 128 acres
  - 944 on 145,133 acres of forest land averaging 154 acres
  - 421 on 7,102 acres in rural residential areas, averaging 17 acres
  - 90 in urban areas,
- 61% of farmland subdivision claims are in the Willamette Valley on 131,629 acres of mostly “high value” land, averaging 75 acres.
- The Oregon Department of Agriculture mapped these subdivisions<sup>1</sup> and told the Legislature they would undermine agriculture in the North Willamette Valley and Hood River County.
- The surprise: Development rights under a Measure 37 “waiver” are not transferable to third parties.

*Justifications Invalid.* Studies published since the 2004 election show two key Measure 37 justifications were invalid. *First*, proponents argued zoning has reduced farm land values. One study<sup>2</sup> found from 1965-2002 average farm land values in 21 Western and Central Oregon counties increased faster than the stock market; in Eastern Oregon values rose less strongly but still 41% faster than inflation. Two other studies found the value of *regulated* farm land in Oregon rose faster than *unregulated* land in Washington state,<sup>3</sup> and California<sup>4</sup> (see p. 27-28).

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<sup>1</sup> <http://www.oregon.gov/ODA/NRD/m37.shtml>

<sup>2</sup> Henry R. Richmond, and Timothy G. Houchen, “Oregon’s Public Investment in Conservation, Prosperity and Fairness: Reduced Taxation of Farm and Forest Land, 1974 - 2004,” American Land Institute, February 23, 2007 <http://hdl.handle.net/1957/5503>. Table 15, p. 68

<sup>3</sup> William K. Jaeger, Andrew J. Plantinga. “How Have Land-use Regulations Affected Property Values in Oregon?” Special Report 1077, Oregon State University Extension Service, June 2007, p. 22 (<http://extension.oregonstate.edu/catalog/pdf/sr/sr1077.pdf>)

<sup>4</sup> John D. Echeverria, “Property Values and Measure 37, Exposing the False Premise of Regulations Harm to Landowners,” Georgetown Environmental Law and Policy Institute, Georgetown University Law Center, June 2007, p. 19.

*Second*, proponents argued land use laws have been unfair because the 1973 legislature provided no compensation for land use limitations. But new research found the legislature mandated property tax reductions in consideration of foregone uses on farm and forest land, and that those rural tax reductions -- financed by the 97% of taxpayers who live in urban and suburban areas -- total \$4.9 billion, 1974 - 2004.<sup>5</sup>

*Voter Intent Sidetracked.* The 2007 Legislature assessed the new research and what the 7,462 claims would do, and concluded that, however technically correct they might be, agency and judicial interpretations of Measure 37 thwarted voters' intent on two points:

- Voters assumed waivers would be transferable, but the Attorney General and the courts interpreted Measure 37 to mean waivers are not transferable; 3,153 small claims have been held up for two years
- Voters assumed landowners would be compensated for losses, but DLCD and the courts interpreted Measure 37 to allow thousands of subdivisions worth far more than what owner could have lost.

*Measure 49 Modifies Measure 37.* To put Measure 37 back on the track voters intended, the Legislature proposed that all 7,462 claims go forward and receive transferability, that small claims be approved without proof of loss, and that large claims be limited, especially claims on high value land or in groundwater restricted areas:

- *3,153 claims for 1-3 lots* (42% of all claims) approved without proof of loss; claims for 4 or more lots may "amend down" to get that treatment;
- *4,309 claims for 4 or more lots* (58% of all claims) would be limited to:
  - *3 lots* on high value farm or forest land, and in groundwater restricted areas;
  - *4-10 lots* on other land, based on loss shown by a "before and after" appraisal, plus interest from the date of the loss to the date of the claim.

The Legislature put its proposed changes to Measure 37 on the November 2007 ballot, in the form of Measure 49, and asked voters to decide: Which do I like: Measure 37 as interpreted, or Measure 37 as modified by Measure 49?

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<sup>5</sup> Richmond and Houchen, Table 3, p. 4

## II. ABOUT THE NUMBERS

The object of this analysis is to estimate the number and acreage of subdivisions (4 or more lots), partitions (1-3 parcels), and nondivisions (mainly a homesite on an existing parcel) that would result from 7,462<sup>6</sup> Measure 37 “waivers.” Measure 37 requires compensation if regulations reduce value. Compensation is cash, or a waiver of the regulation to allow “a use” permitted when the owner acquired title. Because Measure 37 provided no funding, all compensation is by waiver.

### A. Database of Analysis

The analysis is based on claims filed as of December 2006,<sup>7</sup> as compiled by the Institute of Portland Metropolitan Studies, Portland State University. Under the direction of Dr. Sheila A. Martin, technicians entered claim data state as local governments made it available. Data is unverified, but is as stated in claim applications. PSU standardized the zoning and division claims into several categories, described below. County practices and individual claims differed greatly in the level of detail reported. On March 12, 2007, PSU posted its database at <http://www.upa.pdx.edu/IMS/currentprojects/m37/index.php>. (As of August 14, 2007, that website is unchanged.) On March 19, 2007 PSU electronically transferred a slightly updated (but unposted) data base to ALI so ALI could calculate estimates directly. This report is based on the March 19, 2007 data.

Many claims received and reported by PSU lack complete data:

- 2,125 (29%) of claims on 237,561 acres, do not specify one of PSU’s five rural zones (see “All Others” rows in Appendix A);
- 2,918 (13%) do not specify type of division or use other than a division;
- 423 (29%) of farm and forest subdivisions do not enumerate lots.

Use of the PSU database to assess multiple factors regarding Measure 37’s potential impact thus must be based on only a small sample of all claims filed. For example, a table about claims on farm and forest land in a report to the Legislature<sup>8</sup> by former Oregon Governors Victor Atiyeh and Barbara Roberts and John D. Gray, was based on 2,180, or 33%, of claims. Such qualified findings leave readers wondering.

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<sup>6</sup> The 7,462 figure and other findings in this report reflect Plum Creek Timber Inc’s. August 10, 2007 decision to abandon 101 claims on 42,026 acres of forest land in Lincoln and Coos counties.

<sup>7</sup> An estimated 400-800 additional claims have been filed since December 2006. No attempt is made here to assess the number or type of that 5% - 10% increase in total claims.

<sup>8</sup> Gov. Victor Atiyeh, Gov. Barbara Roberts, John D. Gray, “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,” March 21, 2007 (<http://hdl.handle.net/1957/5503>).



In addition to incomplete data, two of the five rural zones in the PSU database -- Farm Forest “FF” and “Multiple Rural, OSC” -- have so few claims, especially in individual counties, that including these two essentially farm and forest zones in the analysis tended to complicate understanding of Measure 37's potential impact on farm and forest land.

B. Method to Assess Claims with Unspecified Data

ALI used the five- step process summarized below to estimate characteristics for claims with unspecified data, and to fit all claims into three, rather than five, rural zones. Estimates were made for claims from the 36 counties, including those reporting zero claims. County estimates were then aggregated to five regional and statewide totals.

1. The 7,462 claims were disaggregated into Rural, Urban and unspecified zones, as shown in the table below. Rural zones included: farm use (EFU), forest use (FU), mixed farm and forest (FF), rural residential (RR), open space and conservation (OSC).<sup>9</sup> Urban zones included: commercial, industrial, mixed use, single family residential, multifamily residential, and other uses. In the database, 377 claims listed more than one zone. Of these multiple zone claims, 362 listed at least one rural zone, and 15 listed only urban zones.

Table 1

Classification of Claims as Reported		
Zoning	No. of Claims	Pct. of Claims
Rural (EFU, FU, FF, RR, and OSC)		
Single Rural	4,739	64%
Multiple Rural (More than one zone, at least one of which is rural)	362	5%
Urban - all (one or more zones, none of which is rural)	236	3%
Unspecified or Blank	<u>2,125</u>	<u>29%</u>
Total	7,462	100%

2. The 5,101 rural zone claims were disaggregated by the type of division sought: Partition, Subdivision, None. The “None” category includes: (1) Claims PSU analysts had labeled as None; and (2) claims labeled as “Not Specified” or left blank, but which included additional comments identifying claimant’s lack of intent to divide. In the tables in the Appendices summarizing ALI’s allocations, results for steps one and two appear in the “As Reported” set of columns.
3. Within zone types in each county, claims specifying no division status (not specified, blank, or with no comment indicating claimant intent) were allocated proportionally

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<sup>9</sup> One OSC claim in Multnomah County was identified as Urban, and classified as such.

among claims with known division status, separately both for number of claims and for acreage. (That is, aggregate non-specifying claims and acreage were allocated proportionally, rather than allocating individual claims to one zoning status or another.) In the tables summarizing allocations, results for this step appear under the “(A.)” set of columns.

4. Remaining claims, which did not list a zoning status, were allocated within the zones identified above, and by division type for rural zones. For each zone and division type, the proportion used was derived from the allocation after step 3. In the tables summarizing allocations, results for this step appear under the “(B.)” set of columns. A minor exception to this approach was the 548-acre mill-site portion of a 14,897-acre Stimson Lumber claim which was not in a single zone; ALI classified the entire 14,897 acres as forest land.
5. To simplify presentation of the claims and acreage, Farm/Forest claims and Multiple Rural Zone or OSC claims were allocated between EFU and FU. Based on statewide average acre per claim size by zone, Farm/Forest claims were allocated 83 percent to EFU and 17 percent to FU, and Multiple Rural Zone claims were allocated 75 percent to EFU and 25 percent to FU. In counties without EFU or without FU claims, the allocation went entirely to the zone type with claims. In the tables summarizing allocations, results for this step appear under the “(C.)” set of columns.

Seventy-two claims totaling 47,384 acres filed by Stimson Lumber Company, Portland, comprise 27% of 174,816 acres of forest land claims statewide, and a higher percentage of acreage for forest land subdivisions in five counties: Washington (35,486; 90% of county total), Tillamook (8,131; 68%), Columbia (3,173; 39%), and Clatsop (494; 43%). (Table 11) The Stimson claims list no zoning or division type. ALI classified all the Stimson claim land as forest land; given that Stimson’s 72 claims average 568 acres, ALI classified all the Stimson claims as subdivisions, not partitions or non-divisions.

*Subdivision Lots.* As reported by PSU, 71% of the 1,104 farmland subdivision claims, and 61% of the 388 forest subdivision claims specified lots demanded. Statewide, lots demanded for 1,104 farm land subdivisions averaged 33 lots, and lots demanded for 388 forest land subdivisions averaged 25 lots each.

ALI did not estimate total lots, or lots by zone type and division. That would involve basing such estimates on earlier estimates of claims and claim acres by zoning and division type. Given the relatively high rates at which the “as reported” farm and forest subdivision claims *did* enumerate lots, and given that the *average* lots per subdivision is more useful than a “total lot” figure for assessing Measure 37’s impacts, the report states average lots per subdivision as reported by PSU.

Of 276 urban claims statewide, the 151 which did not specify division type were allocated the same way. Acreage totals were not estimated by division type for the 276 urban claims.

Findings are presented statewide, and by five regions -- the Willamette Valley, Central Oregon, Eastern Oregon, Southern Oregon and the Oregon Coast in Table 2 and Tables 6 - 10. Appendices present allocation spreadsheets of claim data for Oregon (Appendix A), the Willamette Valley (Appendix B), the nine Willamette Valley counties (Appendices C - K), and Hood River and Jackson Counties (Appendices L and M). This report, including claim allocation spreadsheets for all 36 counties, is posted at Oregon State University's website: <http://hdl.handle.net/1957/5503>.

The allocations and the unverified nature of the PSU claim data mean this report's findings are reasonable estimates, not precise determinations.

The report was researched by Timothy G. Houchen, Senior Associate, American Land Institute, and written by Henry R. Richmond, Executive Director, American Land Institute, Portland, Oregon. (See Appendix I).

### III. STATEWIDE

Measure 37's main consequence would be large subdivisions on prime Willamette Valley farm land.

- Of 7,462 claims statewide, only 276 (3.7%) are inside urban growth boundaries.
- Of the 7,186 rural claims, 4,922 (68%) are on farm land, including 2,854 subdivisions averaging 128 acres and 33 lots each.
- 61% of the farm land subdivision claims statewide are in the Willamette Valley, which has only 9.5% of the state's farm land, but half the state's best land.

Other highlights:

- Fewer but larger tracts of farm land would be divided in four regions outside the Willamette Valley (Tables 7, 8, 9 and 10)
- Farm operations on half of Hood River County's 23,506 acres of farm land are affected by subdivision claims; in 2006, county pear, apple and cherry orchardists generated \$2,454/acre, second highest among Oregon's 36 counties (p. 15).
- Southern Oregon, with 1,154 claims, is second among regions in number of claims: half (574) the region's claims are in Jackson County, with its world-famous pear orchards.

#### A. Results Proponents Predicted

Of the 7,462 claims, 3,154, (42%) are modest -- 1,906 1 - 3 lot partitions; 1,247 homesite approvals without a division -- including 186 urban claims (Table 2).

#### B. Results Opponents Feared

Of the 7,462 claims, 4,309, or 58%, demand subdivisions, including the following 3,797 large subdivisions on farm and forest land.

- 2,854 farm land subdivisions, averaging 128 acres, on 364,462 acres
- 944 forest land subdivisions, averaging 154 acres, on 145,133 acres (Table 2)

Claims are geographically uneven. Clackamas and Washington counties combined have 26% of all claims and 29% of all farm and forest land subdivision claims; half of such claims statewide are in six counties (Tables 3 and 4). Conversely, thirteen counties have zero forest land subdivision claims, and four Eastern Oregon counties have zero farm land subdivision claims; one county has two claims (Tables 3 and 4).

Table 2

**Oregon**  
**Subdivisions, Partitions, Non-Divisions**  
**Farm and Forest Land; Urban Areas**

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claims
Farm Land	2,854	364,462	128	33	1,205	71,578	59	863	82,089	95	4,922	518,128	105
Forest Land	944	145,133	154	25	350	16,357	47	186	13,326	72	1,480	174,816	118
Rural-Res.	421	7,102	17	11	304	2,323	8	59	496	8	784	9,921	13
Urban	90				47			139			276	3,945	14
Total	4,309	516,697	127		1,906	90,258	47	1,247	95,911	77	7,462	706,811	95

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

Table 3

Subdivisions on Farm Land  
by County

	County	Claims	Acres	Acres Per Subdivision
1	Clackamas	435	18,313	42
2	Marion	274	19,105	70
3	Washington	260	12,007	46
4	Linn	225	26,447	118
5	Jackson	205	35,725	174
6	Yamhill	193	20,860	108
7	Lane	149	16,203	109
8	Polk	126	11,275	90
9	Hood River	118	4,980	42
10	Deschutes	115	12,349	108
11	Douglas	82	6,486	79
12	Jefferson	79	20,305	259
13	Coos	65	7,769	120
14	Klamath	61	15,167	247
15	Crook	57	39,641	695
16	Benton	46	5,632	121
17	Umatilla	44	29,234	670
18	Clatsop	43	2,618	60
19	Columbia	39	2,012	51
20	Josephine	38	2,983	78
21	Union	35	15,037	425
22	Multnomah	30	1,788	60
23	Baker	29	13,907	485
24	Wasco	21	8,697	416
25	Curry	20	4,577	227
26	Lincoln	20	1,255	63
27	Tillamook	17	457	26
28	Wallowa	9	1,749	201
29	Grant	7	4,352	270
30	Malheur	6	735	123
31	Lake	4	1,192	298
32	Wheeler	2	1,608	804
33	Gilliam	0		
34	Harney	0		
35	Morrow	0		
36	Sherman	0		
	Total	2,854	364,462	128

Table 4

Subdivisions on Forest Land  
by County

	County	Claims	Acres	Acres Per Subdivision
1	Washington	136	39,763	293
2	Clackamas	130	5,748	44
3	Josephine	99	7,069	71
4	Jackson	94	5,531	59
5	Columbia	89	8,134	91
6	Coos	64	17,615	275
7	Lane	64	9,166	144
8	Curry	45	15,573	350
9	Tillamook	42	11,977	283
10	Lincoln	33	4,663	141
11	Hood River	23	5,049	217
12	Yamhill	20	2,632	133
13	Multnomah	18	881	49
14	Douglas	15	1,292	84
15	Clatsop	14	1,139	82
16	Klamath	13	2,051	162
17	Marion	11	733	68
18	Polk	10	871	88
19	Deschutes	9	1,317	149
20	Benton	8	1,099	137
21	Jefferson	4	1,837	501
22	Wasco	2	553	277
23	Grant	1	439	439
24	Baker	0		
25	Crook	0		
26	Gilliam	0		
27	Harney	0		
28	Lake	0		
29	Linn	0		
30	Malheur	0		
31	Morrow	0		
32	Sherman	0		
33	Umatilla	0		
34	Union	0		
35	Wallowa	0		
36	Wheeler	0		
	Total	944	145,133	

#### IV. BY REGION

The Willamette Valley has more claims, and more claim acres, than any other region. Fewer but larger claims are on the Coast, Eastern Oregon and Central Oregon (Table 5).

Table 5

	Oregon Claims by Region					
	Claims	%	Acres	%	Acre/Claim	
Willamette Valley	4,397	58.9	266,433	37.7	61	
Southern Oregon	1,152	15.4	94,280	13.3	82	
Oregon Coast	823	11.0	90,909	12.9	110	
Eastern Oregon	701	9.4	172,164	24.4	245	
Central Oregon	<u>389</u>	<u>5.2</u>	<u>83,025</u>	<u>11.7</u>	<u>213</u>	
Total	7,462	100	706,811	100.0	95	

##### A. Willamette Valley

With only 9.5% of the state's farm land acres, but about half the state's "high value" soils, in 2006 Willamette Valley farms generated \$2.3 billion, or 53% of the state's \$4.4 billion in farm sales.<sup>10</sup>

##### 1. Small Claims

Of the 4,397 Willamette Valley claims, 2,002, or 46%, seek 1-3 homesites. These 2,002 claims include 166 partitions averaging 7 acres on 1,161 acres in areas zoned rural residential (RR). RR areas typically are "exception areas" not suitable for farming or forestry. These 2002 claims also include 137 urban claims seeking 1 - 3 homesites; total urban claims of 198 are 4.5% of all Willamette Valley claims.

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<sup>10</sup> Oregon State University Extension Service, Oregon County and State Agricultural Estimates, Special Report 790-06, Revised May 2007, p. 2



Table 6

Willamette Valley  
Subdivisions, Partitions, Non-Divisions  
Farm and Forest Land; Urban Areas

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim
Farm Land	1,738	131,629	76	20	836	33,068	40	558	24,310	44	3,133	189,008	60
Forest Land	396	60,894	154	21	184	6,725	37	107	4,243	40	687	71,862	104
Rural Resid'l.	199	2,720	14	9	166	1,161	7	14	87	6	379	3,967	10
Urban	61				32			105			198	1,596	8
Total	2,394	195,243	81		1,218	40,954		784	28,640		4,397	266,433	101

Willamette Valley counties are: Benton, Clackamas, Lane, Linn, Marion, Multnomah, Polk, Washington, and Yamhill.

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

## 2. Large Subdivisions

2,394, or 54%, of Willamette Valley claims demand typically large subdivisions, many on the state's most productive farm and forest land:

- 1,738 claims on 131,629 acres demand subdivisions averaging 76 acres and 20 lots, scattered throughout commercial farm areas;
- 396 claims on 60,894 acres, demand subdivisions of forest land averaging 154 acres;
- 199 claims on 2,720 acres in rural residential (RR) zones demand subdivisions averaging 14 acres. The RR lands themselves are impractical for farming, but lands they border typically are not.

On March 26, 2007, Jim Johnson, Oregon Department of Agriculture, explained to the Joint Committee on Land Use Fairness, the impact which nonfarm development *on claim acreage* has on farm investment on *surrounding acreage* is a more important factor bearing on the continued viability of agriculture than the total number of Measure 37 claims and the total amount of Measure 37 acreage. This is because a large new subdivision in the middle of a commercial farm area threatens the ability of farmers on 3 - 5 times the amount of surrounding acreage to carry out farm practices. This is a problem because carrying out farm practices is the only way a farmer can generate the income needed to amortize existing

and future farm investments. If farmers fear a new subdivision will be established across the fence, farmers will hesitate to borrow long-term against their land to invest in equipment, structures, etc.<sup>11</sup> The Oregon Department of Agriculture map of highly scattered claims in Washington County (following p. 13) illustrates the problem. When the investment spigot is turned off, a farm becomes inefficient and uncompetitive, like any other business.

### 3. Two Hard-Hit Portland Metro Counties

Clackamas and Washington counties rank first and second among Oregon's 36 counties both in claims filed and in subdivision claims on farm and forest land.

#### *Washington*

- 902 claims
- 260 farm land subdivisions averaging 46 acres each
- 136 forest land subdivisions averaging 293 acres each

#### *Clackamas*

- 1,049 claims
- 435 farm land subdivisions averaging 42 acres each
- 130 forest land subdivisions averaging 44 acres each

In 2006, Clackamas and Washington counties ranked second (\$395 million) and third (\$321 million), respectively, in farm sales among Oregon's 36 counties.

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<sup>11</sup> The "right to farm" law is no answer. It does not prevent the filing of lawsuits which a farmer must defend. Moreover, the "right to farm" law gives no protection for spray draft, the biggest problem in terms of risk exposure. The legislature's primary goal is to prevent conflicts via land use laws, not to provide defenses to lawsuits.

B. Central Oregon

Jefferson County leads the nation in the production of hybrid carrot seed, bluegrass, mint tea leaf, and garlic seed. The federal North Unit Irrigation District waters 59,000 acres. Stinging bees are an example of conflicts between farm practices and subdivisions in farm areas. In 2007, Jefferson County rancher Gary Harris estimated local farmers would spend \$780,000 on 13,000 beehives to pollinate vegetable seed fields. Harris asked legislators, “Will bees and subdivisions co-exist?”<sup>12</sup>

Jefferson County has fewer (138) claims than Deschutes (185) but Oregon Department of Agriculture maps of Measure 37 claims show Jefferson County has more high value irrigated farm land at risk than either Deschutes or Crook, the other two Central Oregon counties.

Table 7

Central Oregon  
Subdivisions, Partitions, Non-Divisions  
Farm and Forest Land; Urban Areas

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim
Farm Land	250	72,294	289	80	41	3,778	93	40	2,585	64	331	78,657	237
Forest Land	12	3,154	253	29	2	146	68	5	133	27	19	3,432	176
Rural/Res.	14	391	27	8	6	42	7	4	64	76	24	497	20
Urban	6				4			4			14	439	32
Total	282	75,839	274		53	3,966	81	53	2,782	57	389	83,025	213

Central Oregon counties are: Crook, Deschutes and Jefferson

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

<sup>12</sup>

Written testimony to Joint Committee on Land use Fairness, 2007 Oregon Legislative Assembly, February 8, 2007.

### C. Eastern Oregon

The 15 Eastern Oregon counties have 77% of the state's 15.6 million acres of farm land, but only 701, or 9%, of claims statewide. Six Eastern Oregon counties, Gilliam, Harney, Lake, Malheur, Morrow and Sherman, with 36% of all the state's farmland, have only one claim (Table 3, p. 12). With little high value land, in 2005, Eastern Oregon farms and ranches generated \$1.4 billion, or 33%, of total farm sales statewide.

Measure 37 threatens commercial agricultural in only one Eastern Oregon county, Hood River. With 23,506 acres of farm land, Hood River County has *less than half of one percent of all the farm land in Eastern Oregon*. But, with 233 claims, the county has 33% of Eastern Oregon's 701 claims, and 35% of claims demanding farm land subdivisions (see Appendix L). The county's 233 claims are on 2,993 acres, or 13%, of Hood River County's farm land. The "shadow effect" of these claims would threaten productive use of 8,000-14,000 additional acres, well over half Hood River County's farm land. In 2006, the county's farm sales totaled nearly \$58 million. At \$2,454 per acre in 2006, Hood River County's orchard and other farm land ranked second only to Tillamook County (\$3,408 per acre, on 31,791 acres) in terms of productivity per acre.

Table 8

#### Eastern Oregon Subdivisions, Partitions, Non-Divisions Farm and Forest Land; Urban Areas

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim
Farm Land	336	96,657	287	57	115	24,310	209	134	38,160	286	585	158,948	272
Forest Land	38	8,093	211	63	12	1,417	121	7	1,654	225	57	11,164	194
Rural Res.	30	734	25	28	5	26	5	6	150	24	42	910	22
Urban	4				8			6			18	1,142	63
<b>Total</b>	<b>408</b>	<b>105,484</b>	<b>261</b>		<b>140</b>	<b>25,753</b>	<b>184</b>	<b>153</b>	<b>39,964</b>	<b>261</b>	<b>701</b>	<b>172,164</b>	<b>245</b>

Eastern Oregon counties are: Baker, Gilliam, Grant, Harney, Hood River, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco, and Wheeler.

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

D. Southern Oregon

Jackson County, with its world-famous pear orchards, has 574, or 50% of Southern Oregon's 1,152 claims, and 79% of the region's 45,194 acres subject to farm land subdivision claims (see Appendix M). Jackson County farm sales in 2005 were \$76 million.

Josephine County has 319 claims, but has only 23,194 total acres of agricultural land, and has lower quality forest land than in wetter, deeper-soiled, less steep, more climate-favored forest land typical of Northwest Oregon.

Table 9

Southern Oregon  
Subdivisions, Partitions, Non-Divisions  
Farm and Forest Land; Urban Areas

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim
Farm Land	325	45,194	139	28	171	9,124	53	82	13,906	170	578	68,224	118
Forest Land	209	13,892	66	15	106	4,641	44	33	4,931	149	348	23,464	67
Rural Res.	91	1,252	14	10	91	703	8	19	129	7	201	2,084	10
Urban	7				4			14			25	508	21
Total	632	60,338	97		372	14,468	39	148	18,966	142	1,152	94,280	82

Southern Oregon counties are: Douglas, Jackson and Josephine

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

## E. Oregon Coast

Oregon's coastal counties have some of the world's best land for growing timber for dimension lumber products. Forest land subdivision claims in the coastal counties total 59,101 acres (41%) of 145,133 acres of forest land subdivision claim acreage statewide. The coastal counties have only 223,630 acres of farm land, or 1.5% of farm land statewide, but coastal counties include some of Oregon's most productive farm land. Tillamook County has the state's highest per acre (\$3,388) annual sales. Unique soils in Curry County allow valuable cranberry crops. Farm land subdivision claims on 18,687 acres equal 12% of the coast's farm land.

Table 10

### Oregon Coast Subdivisions, Partitions, Non-Divisions Farm and Forest Land; Urban Areas

	Subdivisions (4 + homesites)				Partitions (1 - 3 homesites)			Non-Division (1 homesite)			Total		
	Claims	Acres	Acres/ Claim	Lots/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim	Claims	Acres	Acres/ Claim
Farm Land	205	18,687	91	33	42	1,476	35	49	3,128	64	296	23,291	79
Forest Land	287	59,101	206	39	46	3,429	74	34	2,365	70	367	64,895	177
Rural Res.	86	2,004	23	20	36	391	11	16	67	4	138	2,462	18
Urban	10				3			5			22	261	12
Total	588	79,792	138		127	5,297	41	104	5,560	48	823	90,909	110

Oregon Coast counties are: Clatsop, Columbia, Coos, Curry, Lincoln and Tillamook.

Source: Portland State University Measure 37 Database; lots/claim is as reported by PSU.

Of the 47,384 acres of Stimson Lumber Company claims, 11,798, or 25%, are in three coastal counties (Table 11). On August 10, 2007, Plum Creek Timber, Inc., Seattle, announced that it was abandoning 101 claims on 42,026 acres in Coos (9,722) and Lincoln (32,204) counties.<sup>13</sup>

<sup>13</sup> Erik Mortenson, "Timber firm pulls land-use claims," *Oregonian*, August 10, 2007, p. B -1

Table 11

Stimson Lumber Company Claims

County	No.	Acres	Acres/Claim
Clatsop	3	494	165
Columbia	20	3,173	159
Tillamook	11	8,131	739
Washington	<u>38</u>	<u>35,586</u>	936
Total	72	47,384	658

Source: Portland State University Measure 37 Database

These claims were mainly filed until late November 2006, and are not scheduled to be decided until after the November 2007 election.

## V. NINE WILLAMETTE VALLEY COUNTIES

Measure 37 claims in the Willamette Valley counties are examined in greater detail because the nine Willamette Valley counties, with only 9.5% of Oregon’s farm land, have 59% of claims, statewide. As in the rest of Oregon, 95% of the claims in the Willamette Valley attack farm and forest land zoning.

### A. Subdivisions

Of the 4,397 claims, 2,394, or 54%, demand *subdivisions* averaging 81 acres on 195,243 acres of farm and forest land (Table 6, p. 11). Another 2,002 claims, or 46%, demand either partitions (1 - 3 homesites), or a homesite without a new division.

Table 12

#### Claims by Type of Land Division Willamette Valley Counties

	Number	Percent
Subdivisions	2,394	54
Partitions	1,218	28
Non-Divisions	<u>784</u>	<u>18</u>
Total	4,397	100

Source: Portland State University Measure 37 database

Of 2,134 farm and forest subdivisions:

- 1,738 (81%) on 131,629 acres of farm land average 76 acres (Table 13).
- 396 (19%) on 60,894 acres average 154 acres (Table 14).

Of the 60,894 acres of forest land subdivisions Valley-wide, 39,763, or 65%, are in Washington County. Of Washington County’s 39,763 acres of forest land subdivisions, Stimson Lumber Company’s 35,586 acres comprise 90%.

### B. Rural Partitions and Non-Divisions

Of the 4,397 Willamette Valley claims, 836 demand partitions of 1-3 parcels on 33,068 acres of farm land (Table 13), and 184 demand partitions on 6,725 acres on forest land (Table 14).

Another 680, or 15.5%, of the 4,397 Willamette Valley claims, on 28,640 acres, are “non-divisions,” i.e., claims seeking a homesite on an existing lot or parcel in any of the five PSU rural zones, a lot line adjustment, or other relief not involving division of land (Table 15).



C. Urban Claims

Of 4,397 Willamette Valley claims, 198 claims, or 4.5%, are “urban,” i.e. are not one of PSU’s five rural zones. Of those 198 “urban” claims, 115, or 58% are in cities, including 75 in cities in Multnomah County and 22 in cities in Washington County. The other 83 “urban” claims, are county claims, either *inside* a UGB, or *outside* a UGB and in an “exception” area.

The 198 urban claims in the Willamette Valley are 72% of the 276 urban claims statewide.

Table 13

Measure 37  
Farm Land Subdivisions and Partitions  
Willamette Valley Counties

County	Subdivisions			Partitions		
	Number	Acres	Average	Number	Acres	Average
Benton	46	5,632	122	24	1,182	49
Clackamas	435	18,313	42	118	3,504	30
Lane	149	16,203	109	24	841	35
Linn	225	26,447	118	186	8,969	48
Marion	274	19,105	70	97	2,799	29
Multnomah	30	1,788	60	6	41	6
Polk	126	11,275	90	81	4,049	50
Washington	260	12,007	46	188	4,874	26
Yamhill	<u>193</u>	<u>20,860</u>	<u>108</u>	<u>111</u>	<u>6,810</u>	<u>61</u>
Total	1,738	131,629	76	836	33,068	40

Source: Portland State University Measure 37 database

Table 14

Measure 37  
Forest Land Subdivisions and Partitions  
Willamette Valley Counties

County	Subdivisions			Partitions		
	Number	Acres	Average	Number	Acres	Average
Benton	8	1,099	137	10	317	31
Clack	130	5,748	44	47	1,274	27
Lane	64	9,166	144	58	3,047	53
Linn	--	--	--	--	--	--
Marion	11	753	68	--	--	--
Multnomah	18	733	49	6	143	25
Polk	10	871	88	--	--	--
Washington	136	39,763	293	53	1,226	23
Yamhill	20	2,632	133	9	718	77
Total	396	60,894	154	184	6,725	37

Source: Portland State University Measure 37 database

Table 15

Measure 37  
 Non-Division By Zone and Acreage  
 (1 Homesite, No Partition)  
 Willamette Valley (as reported by PSU)

	EFU		FF		Forest		Multiple		RR		Total	
	Claims	Acres	Claims	Acres	Claims	Acres	Claims	Acres	Claims	Acres	Claims	Acres
Benton	21	1,393	3	109	4	162	1	8	1	7	30	1,679
Clackamas	61	1,164	7	238	13	328	5	143	11	55	96	1,928
Lane	43	3,442	4	353	21	825	4	247	--	--	72	4,869
Linn	45	3,992	--	--	--	--	6	49	--	--	51	4,301
Marion	51	809	1	20	--	--	3	1,011	1	2	56	1,842
Multnomah	12	263	--	--	11	276	21	217	--	--	45	757
Polk	19	1,518	11	404	--	--	6	575	--	--	36	2,496
Washington	104	2,960	81	1,761	19	654	5	532	2	22	211	5,930
Yamhill	<u>62</u>	<u>3,210</u>	<u>--</u>	<u>--</u>	<u>12</u>	<u>1,179</u>	<u>7</u>	<u>450</u>	<u>--</u>	<u>--</u>	<u>82</u>	<u>4,840</u>
Total	418	18,751	107	2,884	80	3,426	59	3,492	15	87	680	28,640

## VI. INTERPRETING INITIATIVE MEASURES: VOTER INTENT AT RISK

Compared to a legislative bill, the language of an initiative measure is more subject to the risk that agency or judicial interpretation, though done in good faith, can nonetheless cause results at odds with voter intent. To become law, a bill in the legislature must survive the scrutiny of public hearings, questions about the intent or effect of a phrase, word or comma, hostile amendments, news and editorial comment, floor debate, etc. In contrast, initiative measures are drafted privately. If voters approve a ballot measure, its language goes from the sponsor's desk directly to Oregon Revised Statutes. On two key points, the 2007 Legislature concluded interpretations of Measure 37 would thwart voter intent.

### A. Why So Many Big Subdivisions?

That threat of 4,309 subdivisions (Table 2, p. 8) emerged in Spring 2005, when (1) it became clear the Legislature would not provide money to pay compensation which Measure 37 had not provided, and that, accordingly, "waivers" would be the sole form of compensation, and (2) DLCD interpreted "reduction in value" and "waiver."

#### 1. DLCD's Interpretation of "Reduction in Value" and "Waiver"

- The "basis" of a claim is not reduction in value, but whatever use the landowner demands as a waiver.
- Waivers have nothing to do with compensation; the value of the use the owner demands may greatly exceed an owner's actual loss. The only question is if the use was allowed when the claimant acquired title, even though, in the 1960s , nearly all rural land was unzoned, essentially any use was allowed, and a claimant in 2006 thus may demand any use.
- Proof of an *amount* of loss would be required if the government were to pay cash compensation; but such proof is "pointless" if compensation is in the form of a waiver.
- To approve a waiver the government need only find that "it is more likely than not" a land use regulation had the "effect" of reducing value "to some extent."
- To decide if such an "effect" occurred, the government compares the difference between:
  - The value of the property today if Measure 37 *exempts* claimant's land from the regulation, but leaves the regulation in place for tens of thousands of other acres, and
  - The value of the property today as regulated.

- If such an “effect” is shown, Government “must” approve whatever use the claimant demands.<sup>14</sup>

## 2. A Case in Point

A Washington County claim<sup>15</sup> illustrates how DLCD’s interpretation would allow big subdivisions. Claimant acquired 54 acres of prime farm land in 1965. In February 2005, claimant said the county’s 1973 38-acre minimum lot size reduced value by \$9.5 million. Claimant argued that if Measure 37 exempted claimant’s land from farm zoning, but left about 122,000 acres of other farm land subject to farm zoning, the value of the 54 acres cut into 97 half-acre lots would be \$9.5 million.

DLCD required no information regarding reduction in value or loss caused by the county’s enforcement of the minimum lot size, when, in 1973, that law first restricted the use of the 54 acres; claimant provided no such information. On August 9, 2005, DLCD approved the claim and the waiver for the \$9.5 million subdivision, stating:

“... because the claim does not provide an appraisal or other specific explanation for how the specified restrictions reduced the fair market value of the property, a specific amount of compensation cannot be determined. Nevertheless, based on the record for this claim, the department acknowledges that the laws on which the claim is based likely have reduced the fair market value of the property to some extent.” (Final Staff Report and Recommendation, pp. 6-7)

Oregon’s leading newspaper editorially observed<sup>16</sup> that if the state had condemned the 54 acres in 1973 to build a highway, but neglected to send the landowner a check, the principal and interest the owners would have received in 2005 for a 100% *taking* of the 54 acres in 1973 would be \$838,055 -- not \$9.5 million.

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<sup>14</sup> DLCD officials have said they needed to grant whatever use a claimant demands because, under Measure 37, if the land use regulation continues to apply to the property 180 days after the claim is filed, the state is liable for compensation and attorney’s fees. If the state waiver were only to allow “a use” equal in value to the loss, not the more valuable use the claimant demanded, the regulation would still apply to the property, and the state would be exposed to demand for compensation. But this exposure exists only if (1) the use demanded, not reduction in value, is the basis of a Measure 37 claim, and (2) waivers have nothing to do with compensation. If, instead, loss is the basis of a claim, and if waivers are compensatory, the regulation would still apply to a claimant’s property, but it wouldn’t matter. The state’s obligation to compensate would have been fully discharged, either by payment of cash for the loss, or by a waiver equal in value to the loss. Moreover, even if DLCD gives a claimant whatever use a claimant demands, the regulation still applies to the claimant’s property, and under the state’s view, the state still would be exposed to liability.

<sup>15</sup> Claim M119803,  
[http://www.oregon.gov/LCD/docs/measure37/finalreports/M119803\\_Bernards\\_Final\\_Report.pdf](http://www.oregon.gov/LCD/docs/measure37/finalreports/M119803_Bernards_Final_Report.pdf)

<sup>16</sup> “Red Flags of Worry,” *Oregonian*, March 11, 2007, p. 1, Opinion.  
[http://ir.library.oregonstate.edu/dspace/bitstream/1957/5503/2/Oregonian\\_3-11-07\\_001.pdf](http://ir.library.oregonstate.edu/dspace/bitstream/1957/5503/2/Oregonian_3-11-07_001.pdf)

Neighboring farmers challenged DLCD's approval.<sup>17</sup> They argued claimant's \$9.5 million demand did not represent a reduction in fair market value due to land use restrictions on claimant's property, as required by Measure 37, but an increase in value based on restrictions on claimant's neighbors' land -- turning Measure 37 on its head. The trial judge accepted DLCD's interpretation.<sup>18</sup> With two other cases involving the same issues, the Washington County claim will be argued in the Oregon Court of Appeals, September 4, 2007.<sup>19</sup>

### 3. Two Dissenting Views

Oregon State University economists and Oregonians in Action argued interpretation of "reduction in value" should be based on actual historic loss, adjusted by inflation or interest to the date of the claim, not "exemption value."

*OSU Economists.* Two professors in Oregon State University's Department of Agricultural and Resource Economics explained the difference between "exemption value" and "reduction in value."<sup>20</sup> In 1973, before state land use laws, in, say Washington County, there were 122,000 acres of farm land that were either unzoned or zoned for 2-acre homesites. Given this huge supply of 2-acre homesites, the market value of the vast majority of this 122,000 acres reflected little, if any, 2-acre homesite value. Depending mainly on proximity to town, *parts* of the 122,000 acre supply may have had *some* rural residential value. And a land use regulation adopted after 1973 may have reduced or eliminated that value on *those acres*; under Measure 37, compensation for that reduction in value would be due. However, in 1973, *no* tract of farm land was in the spectacularly lucrative circumstance of being *unzoned* while the balance of the 122,000 acres was *zoned*. Accordingly, the fair market value of no part of the 122,000 acres -- or any reduction from market value after 1973 -- could be based on such a non-existent "monopoly-type" circumstance. Yet, under DLCD's interpretation of Measure 37, claims are being approved on the theory that reduction in value is the difference between (1) claimant's property subject to regulation in 2007, and (2) claimant's property *exempt* from regulation in 2007 -- while assuming that essentially all the other land to which the farm zoning had applied since 1973 remains in place.

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<sup>17</sup> A neighboring farmer offered \$12,500/acre, representing a 2,264% increase in value from the date claimant acquired title, or twice the S & P 500's performance over the same 40 years. Preferring monopoly value, the claimant rejected the offer.

<sup>18</sup> *Vanderzanden v. LCDL*, Marion County Circuit Court, Case No. 05C/9565, Hon. Don Dickey, Judge, January 8, 2007.

<sup>19</sup> *HRVRC v. State of Oregon* (CA A135490) (Marion County Circuit Court No. 06C17267). DLCD's July 11, 2007 brief (pp. 27-50) again urges the "the-use-the-claimant-demands-is-the-basis-of-the-claim" interpretation outlined above.

<sup>20</sup> Andrew J. Plantinga, "Measuring Compensation Under Measure 37: An Economist's Perspective," Oregon State University, December 9, 2004. William K. Jaeger, "The Effects of Land Use Regulations on Land Prices," Oregon State University, June 8, 2005; (<http://extension.oregonstate.edu/catalog/pdf/sr/sr1077.pdf>)

The OSU professors said that a theoretically more correct way to determine reduction in value would be to calculate the difference between (1) the value of a claimant's land in 2007 *as zoned*, and (2) the value of claimant's land in 2007 as if *none* of the 122,000 acres was zoned for farm use. However, the OSU professors recognized that, for many reasons, this theoretically more correct approach was impossible as a practical matter. Accordingly, they proposed determining the present fair market value of a 1973 loss by adjusting the property's purchase price by the rate of inflation, to the date of the claim.

*Oregonians in Action*. On October 14, 2005, a trial court ruled Measure 37 unconstitutional on the ground Measure 37's waiver procedure was susceptible to being interpreted to allow subdivisions of such great value that waivers would bear no "reasonable relationship" to Measure 37's compensatory purpose.

On appeal to the Oregon Supreme Court, Measure 37's drafter and sponsor, Oregonians in Action (OIA), needed an interpretation of Measure 37 that would prevent the unconstitutional result the trial court identified, and thus enable OIA to argue that the Supreme Court should reverse the lower court's ruling.<sup>21</sup> Like the OSU professors, OIA recognized the practical impossibility of determining reduction in value as if, in 2007, the 1973 regulation applied to *none* of the 122,000 acres to which it had long applied. OIA also recognized that, in takings cases, the courts require only a "fair approximation of loss in value."<sup>22</sup> Accordingly, OIA proposed calculating reduction in value by adjusting the 1973 loss to present fair market value, not by inflation, but by requiring the government to pay interest on the 1973 loss, up to, as provided in ORS 197.352(2), "the date owner makes written demand:"

"If the state had confiscated \$1000 from Smith's saving account for the purpose of providing a public benefit, and 32 years later it is decided by popular vote that this was unfair, presumably all would agree that repayment should include an amount to offset lost interest as well as principal. *That is all that is required under Measure 37.*" (Emphasis supplied)<sup>23</sup>

OIA's interpretation of "reduction in value" produces a different result than DLCD's interpretation. In the Washington County claim cited above at p. 24, if the claimant's land was worth \$1,279 per acre in 1973, and assuming, conservatively, the residential component of that \$1,279/acre value was 20%, and that the 1973 regulation totally eliminated that 20%,

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<sup>21</sup> If the measure can be interpreted to be constitutional, the courts must uphold it.

<sup>22</sup> OIA brief, *Macpherson vs. Dept. of Administrative Services*, Oregon Supreme Court, December 5, 2005, p. 42.

<sup>23</sup> *id.*

claimant's loss would have been \$256/acre, or \$13,384 for the whole 54 acres. Using a 10-year bond rate that compounds interest on that loss from 1973 to February 2005, when claimant filed the claim, total compensation would be \$167,611. If LCDC's 1994 \$80,000 income test caused a further loss of one homesite (about \$55,000 in 1994) interest on that 1994 reduction would bring that loss to \$100,540. The total for both losses would be \$268,151 -- not \$9.5 million. If the county chose not to pay cash, a waiver proportional to this loss would be 1 - 2 homesites -- not 97.

On February 21, 2006, the Oregon Supreme Court reversed the trial court and reinstated Measure 37. As claims processing resumed, DLCD did not adopt OIA's politically unassailable, and legally persuasive, interpretation of Measure 37. Rather, DLCD continued to approve claims based on monopoly values which landowners never owned or lost. On the basis of this interpretation, DLCD and counties have at least tentatively approved thousands of waivers for large subdivisions -- the dollar value of which has nothing to do with loss. Only lack of transferability has prevented large subdivisions from proceeding.

#### B. Why Aren't Waivers Transferable?

In a February 24, 2005 letter of advice to DLCD that was a surprise to all observers, the Oregon Attorney General interpreted Measure 37 to mean development rights granted by a waiver were "personal." That is, the claimant could not transfer the right to develop allowed by a waiver to a third party, but must carry out the development him or herself. Thus, if a claimant were to die before the development is established, the "personal" waiver right evaporates. Given that, banks would not approve construction loans using the development value of a claimant's land as collateral, and title insurance companies would not write title insurance. Three trial courts have rejected challenges to the Attorney General's interpretation. The matter is now before the Court of Appeals.

Large companies may be able to avoid the transferability problem by self-financing projects. However, even if financing is not a problem, and even if a local subdivision approval is obtained, the question remains whether the "personal" use would be a nonconforming use which the owner or purchaser could not expand, or could not rebuild if there were a fire, flood, or landslide.

In these circumstances, few Measure 37 claimants with approved waivers have gone to the trouble to secure local land use approvals. Of the few claims which do have local approvals, few have undertaken construction. This is why Oregon voters have an opportunity to modify Measure 37 in a manner that (1) gives a green light to 42% of the claims that are small, and (2) limits the 58% of the claims demanding subdivisions based on "monopoly value" to 1 - 3 lots on high value land, and 4 - 10 lots on other land.



## VII. RESEARCH REFUTES MEASURE 37 JUSTIFICATIONS

In 2004 Oregon voters heard many arguments to justify Measure 37. If someone could build a house when they bought their property, they should be able to build a house or two today, notwithstanding changes in zoning in the meantime. Environmental overlay zones and proposed regulations limiting development next to streams in the Portland Metro area were said to be unfair. Timber companies said new forest practice regulations would cost jobs. Agree or disagree with these arguments, voters heard them during the 2004 campaign, and no information has been published since refuting them. Accordingly, out of respect for voter intent, Measure 49 does not modify provisions of Measure 37 which assume these arguments as valid.

However, new research refutes two broad “fairness” arguments which proponents emphasized to justify a general unraveling of 30-year-old laws limiting farm land to farm use.

### A. The Value of Regulated Farm Land Has Risen Enviably

For many years, critics of Oregon’s land use program, including Measure 37 sponsors, claimed that state land use laws “stole” property rights, “crushed” the value of farm land, and that Measure 37 was needed to right this wrong.

A report published February 23, 2007<sup>24</sup> shows the premise of this argument is bogus, and that no argument based on farm land market values can justify a *generalized* attack on state laws limiting farm land to farm use, which Measure 37 now threatens. The study found that from 1964 - 2002, \$50,000 worth of average farm land increased faster than did a \$50,000 investment in S & P 500 stocks in the 21 counties in Western and Central Oregon. In the 15 Eastern Oregon counties, farm land values did not increase as fast as the S & P 500, but did increase 41% faster than inflation (Table 16).

Some land rose less than the average, some rose more. Some close-in owners who have not been included in UGBs since the 1970's may have experienced not merely below average increases, but reductions in value. However, west of the Cascades and in Central Oregon, where 91% of Measure 37 claims have been filed, the average value of *regulated* farm land has not only *not* fallen, it has risen enviably.

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<sup>24</sup> Richmond and Houchen (2007), *supra*, note 2 (<http://hdl.handle.net/1957/5503>)

Table 16

Regional Growth in Farm Land Market Value per Acre, 1964 - 2002  
(1964 = \$50,000)

	1964	1969	1974	1978	1982	1987	1992	1997	2002	Percent Change 1964-2002
Willamette Valley	\$50,000	\$72,030	\$120,926	\$238,610	\$337,252	\$253,014	\$351,168	\$521,311	\$696,445	1,393%
Eastern Oregon	50,000	64,941	120,282	216,841	336,949	254,196	300,215	389,397	411,948	824%
Central Oregon	50,000	72,064	112,306	200,813	371,732	282,633	322,536	422,269	719,553	1,439%
Oregon Coast	50,000	68,667	115,585	240,204	336,230	270,000	358,091	538,927	718,012	1,436%
Southern Oregon	50,000	67,203	111,175	261,157	379,699	357,641	467,365	585,620	744,929	1,490%
Oregon	50,000	65,217	108,696	219,130	306,522	235,652	288,261	417,391	522,609	1,045%
S&P500 Index	50,000	59,805	52,639	58,471	67,089	186,069	249,810	541,768	605,839	1,212%
CPI	31.0	36.7	49.3	65.2	96.5	113.6	140.3	160.5	179.9	580%

Willamette Valley Counties: Benton, Clackamas, Lane, Linn, Marion, Multnomah, Polk, Washington, Yamhill

Eastern Oregon Counties: Baker, Gilliam, Grant, Harney, Hood River, Klamath, Lake, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, Wasco, Wheeler

Central Oregon Counties: Crook, Deschutes, Jefferson

Oregon Coast Counties: Clatsop, Columbia, Coos, Curry, Lincoln, Tillamook

Southern Oregon Counties: Douglas, Jackson, Josephine

Source: USDA Census of Agriculture, Table 8.

Published at: Richmond and Houchen, (2007), Table 16, p.68.

Two other recent studies reach similar conclusions. A June 2007 analysis<sup>25</sup> by two Oregon State University resource economists found *unregulated* farm land value in Washington grew about the same as *regulated* farm land in Oregon, 1964 - 2005. A June 2007 study by the Georgetown Environmental Law and Policy Institute, using Census of Agriculture data, found Oregon farm land values increasing more than in California and Nevada, but slightly less than in Idaho.<sup>26</sup>

## B. Legislature Provided Compensation for Rural Landowners

For decades, critics of Oregon land use laws, including sponsors of Measure 37, claimed limitations on farm and forest land are unfair because the 1973 Oregon Legislature failed to compensate rural land owners for development rights eliminated by farm and forest zoning. “The urbanites who benefit from rural zoning should compensate the rural landowners who bear the burden of rural zoning. Measure 37 provides this badly needed remedy.” was the oft-heard argument. ALI’s research refutes the premise of this justification for Measure 37.

### 1. Rural Landowners Have Received \$4.9 Billion in Compensatory Tax Reductions

A month after enacting Senate Bill 100, the state’s basic land use law, as a “goodie” in consideration of land use restrictions, the 1973 Legislature enacted SB 101, the companion bill to Senate Bill 100. Authored by St. Sen. Hector Macpherson (R., Albany), and carried on the Senate floor by St. Sen. (later Governor) Victor Atiyeh (R., Beaverton), SB 101 reduced farm land taxes by \$3.9 billion, 1974 - 2005; parallel legislation in 1975 cut forest land taxes by \$1.0 billion.<sup>27</sup>

Rural tax reductions provided the compensatory, burden-shifting mechanism which the land use program’s critics called for. That is, the roughly 97% of urban and suburban Oregon property tax payers who do not own farm or forest land financed the \$4.9 billion rural tax reduction by paying slightly higher property taxes, year by year. This \$4.9 billion, tax-shift-financed compensation not only happened, but it amounts to an investment in fairness and rural land conservation and productivity that is 2 - 3 times greater than any other public investment in Oregon history (Table 17).

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<sup>25</sup> William K Jaeger and Andrew J. Plantinga, “How Have Land-use Regulations Affected Property Values in Oregon?” Special Report 1077, Oregon State University Extension Service, June 2007.

<sup>26</sup> John D. Echeverria, “Property Values and Measure 37, Exposing the False Premise of Regulations Harm to Landowners,” Georgetown Environmental Law and Policy Institute, Georgetown University Law Center, June 2007.

<sup>27</sup> Richmond and Houchen, 2007, Table 3, p. 4.

Table 17

## Major Oregon Public Investments, by Date, Cost and Present Value

Project	Original Cost (In millions)	Date	Value in 2005 Dollars (in billions)
Bonneville Dam	\$83.6	1937	\$1.5
McNary Dam	\$295.0	1953	\$2.1
The Dalles Dam	\$247.0	1959	\$1.6
John Day Dam	\$448.0	1968	\$2.5
Interstate 5	\$300.0	1956 - 1966	\$1.4
Ten flood control/irrigation dams in the Willamette River Basin	\$408.2	1940 - 1968	\$2.6

## 2. Tax Reductions Greatest Where Most Claims Have Been Filed

The five Willamette Valley counties where urban and suburban taxpayers have paid the most in higher property taxes to reduce rural taxes in order to keep farm and forest land in productive use are counties where 45% of Measure 37 claims have been filed. These five Willamette Valley counties have only 7% of farm land, and 15% of private forest land statewide. However, rural landowners in these counties have:

- Received \$2.3 billion (46%) of the \$4.9 billion in compensatory farm and forest land tax reductions statewide, and;
- Filed 3,388 (45%) of 7,462 Measure 37 claims filed statewide (Table 18).

Table 18

Farm and Forest Land Tax Reductions and Measure 37 Claims  
Five North Willamette Valley Counties, 1974 - 2004

	Farm and Forest Tax Reductions	% State Total	Measure 37 Claims	% State Total
Clackamas	\$729,906,132	15.0	1,049	14.1
Washington	\$554,336,282	11.3	902	12.1
Yamhill	\$210,075,046	4.4	454	6.1
Marion	\$484,829,381	10.0	489	6.6
Linn	\$267,675,176	5.4	494	6.6
Total	\$2,246,822,018	46.1	3,164	45.4

Source: Farm/ forest tax reduction from Richmond and Houchen (2007), Table 3, p 4; claim data from Portland State University, Measure 37 database, January 2007, <http://pdx.edu/ims/m37database.html>;

Under the method of calculating compensation proposed by Oregonians in Action (p. 25), farm land tax reductions in the five counties in Table 18 likely go a long way to offset a reduction in value a landowner may have experienced. For example, in Washington County, the average cumulative farm land tax reduction per acre county-wide, 1974-2004, was \$3,448. In the 54-acre claim discussed above, p. 24-25, assuming the 54 acres received the \$3,448 per acre average, the cumulative tax reduction would be \$186,468 (54.08 acres x \$3,448), or 70% of the \$268,156 reduction in value the claimant experienced in the circumstances assumed.<sup>28</sup>

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<sup>28</sup> Richmond and Houchen (2007) p. 42-43

## VIII. MEASURE 37: AS IS, OR AS MODIFIED?

A legislature is not a court. The Measure 37 issue for the Legislature was not whether agency or judicial interpretations of Measure 37 were technically correct, but whether Measure 37's impending results are what Oregon voters intended. Assessing voter intent is difficult. Accordingly, the Legislature limited its assessment of voter intent to two key issues:

- *Transferability.* Voters assumed waivers would be transferable, but Measure 37 has been interpreted to mean waivers are not transferable. Thousands of small claims have been held up, many involving elderly claimants.
- *Honest Compensation.* Voters assumed landowners would be compensated for what they lost. But, as interpreted, Measure 37 would allow 3,798 farm and forest land subdivisions averaging 134 acres, many worth vastly more than owners lost; these subdivisions threaten Willamette Valley agriculture.

The Legislature concluded Oregon's voters intended waivers to be transferable. Compensation in the form of cash is transferable, so compensation in the form of a waiver should be transferable, too, provided the value of the waiver roughly equals the loss.

The Legislature also concluded voters did not intend that Measure 37 would threaten commercial agriculture in the Willamette Valley. Accordingly, the Legislature proposed modifying claims as follows:

- 3,154 (42%) seeking 1 - 3 homesites would be approved without proof of loss;<sup>29</sup>
- 4,309 (58%) seeking subdivisions would be limited to:
  - 3 lots on "high value" farm and forest land, and claims in groundwater restricted areas;
  - 4-10 lots on other land, based on a "before and after" test for reduction in value, supported by an appraisal; appraisal costs may be added to compensation due.

For future regulations limiting residential use, or farm and forest practices, Measure 49 leaves untouched Measure 37's basic requirement that government must compensate if regulations reduce market value.

Thus, in November 2007, the question for Oregon voters is, do they want Measure 37 as it has been interpreted, or Measure 37 as modified by Measure 49?

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<sup>29</sup> Measure 49 likely would give transferability to *more* than 42% of claims because Measure 49 allows claimants demanding 4 or more lots to "amend down" to 1-3 lots. This treatment of small claims refutes the idea that Measure 49 somehow "repeals" Measure 37.

## APPENDICES

- A. Summary of Allocation of Measure 37 Claims, Oregon
- B. Willamette Valley
- C. Benton County
- D. Clackamas County
- E. Lane County
- F. Linn County
- G. Marion County
- H. Multnomah County
- I. Polk County
- J. Washington County
- K. Yamhill County
- L. Hood River County
- M. Jackson County
- N. About the Authors

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Education:

BA, History, University of California, Berkeley, 1967

JD, School of Law, University of Oregon, 1971

Employment:

Law Clerk to U. S. District Court Judge Gus J. Solomon, Portland, Oregon, 1971-72

Incorporator (1970) and Staff Attorney (1972 - 1975), Oregon Student Public Interest Research Group (OSPIRG), (OSPIRG studies and publicizes consumer and environmental issues).

Founder and Executive Director, 1000 Friends of Oregon, March 1975 to November 1993.

Founder, National Growth Management Leadership Project (state-level organizations from 25 states concerned with land use policy reform), 1989; Chairman, 1989-1996.

Founder, American Land Institute, 1996 to present.

Professional Activities:

Speaker at national conferences on land use, transportation, and environment.

Argued first case under Oregon's land use law in the Oregon Supreme Court, Petersen v. City of Klamath Falls (1977), winning a reversal of two lower court rulings and establishing the principle that local land use decisions must conform to state land use laws.

Co-editor, Oregon State Bar's 27-chapter text, "Land Use," first edition (1976) and second edition (1982).

Member, Board of Directors, Congress for the New Urbanism, San Francisco, California 1994-1999.

Member, National Advisory Board, Trust for Public Land, San Francisco, California, 1996-2000.

Consultant, John B. and Catherine T. MacArthur Foundation, Chicago, 1995

Honors:

Rockefeller Public Service Award, December 1980

Honor Award, Oregon Division, Izaak Walton League of America, 1984

Distinguished Service Award, University of Oregon, 1985

Richard L. Neuberger Award, Oregon Environmental Council, 1993

Personal:

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**EXPERIENCE**

**Economist/Research and Policy Analyst**, American Land Institute, June 1997 - Present. Research issues of tax policy relationship to land use policy, housing prices and land use regulation, infrastructure investment and economic development, history of metropolitan size and governance structure. Critique federal, state, and local government analyses of urban and regional development. Provide economic and policy analysis supporting the business plan for proposed national land use research organization. Research and prepare nine year financial plan for proposed organization, including operating and capital budgets, direct mail membership campaign, and revenue plan.

**Policy and Planning Consultant**, Self-employed, June 1996 - June 1997. Prepared strategic planning analyses from national to community level, addressing scope, process, desired outcomes, and development of goals and performance indicators linked to policy development and management. Consulting projects included: evaluation and development of national results-based strategic planning system; advice and discussion with statewide policy advisory group regarding strategic planning processes and roles of indicators; research and summary of indicators-based systems, including their use by legislative, executive, agencies and community groups for strategic planning and performance-based management; analysis and development of city agency information systems relative to state and regional policy requirements.

**Senior Policy Analyst**, Oregon Progress Board, Salem, Oregon, August 1989 - April 1996. Staff to board that created nationally recognized state strategic planning structure, including Oregon Benchmarks, the first set of measurable statewide policy goals. Researched and analyzed diverse outcomes-based measures proposed for use as policy indicators. Presented and discussed analyses with board and other policy groups, and in strategic planning reports summarizing trends, issues, and policy recommendations.

Managed projects creating key policy indicators, including: Nation's first statewide assessment of adult literacy; first statewide assessment of pre-kindergarten development; three extensive statewide household population surveys. Co-wrote successful four year grant to build a data system for child and family welfare.

Presented and discussed state outcomes-based planning system and its uses with a wide range of audiences, from small community groups across Oregon to national conferences of not-for-profit, planning, business, and government executives. Consulted with ten states and foreign governments regarding the planning structure and establishment of a system of measurable indicators. Represented Progress Board on state agency councils addressing: coordination of services to children and families; child care; disabilities prevention; community health assessment; and coordination of workforce development programs.

**Acting Director**, Oregon Progress Board, Salem, Oregon, June 1995 - October 1995. Guided agency during significant transition in mission and organization. Organized and managed board meeting agendas. Participated in board plans to create community-defined state management system.

## Appendix N, Attachment 2

Coordinated research for framework, including organizing and facilitating community focus group meetings.

**Economic Policy Analyst**, Oregon Economic Development Department, Salem, Oregon, June 1988 - July 1989. Staffed strategic planning committee on human development issues. Researched and analyzed education and social services systems, and developmental issues at each stage of life. Wrote education and workforce chapter of state strategic plan for economic development, including demographic and economic trends, committee's key issues and recommendations. Created and presented public outreach materials summarizing plan to workforce, business, education, and community groups statewide. Organized and managed conference on workforce skills definition and assessment.

**Research Analyst/Intern**, Washington Department of Natural Resources, Seattle, Washington, June 1987 - September 1987. Staffed Seattle business leadership task force investigation of central waterfront development alternatives. Analyzed history of waterfront development in Washington, and constitutional, statutory, regulatory, and policy issues affecting redevelopment planning.

### EDUCATION

**Master of Public Affairs - Urban and Regional Planning**, Princeton University, Princeton, New Jersey. Curriculum: Economic analysis of public policy issues; econometric and other statistical analysis of social science and public policy issues; socioeconomic quantitative planning methods; urban and land use policies and planning; financial management and planning; organizational management.

**Juris Doctor**, University of Washington, Seattle, Washington. Curriculum: Diverse legal studies, with concentration in land use and environmental law.

**Bachelor of Arts**, Economics and Mathematics, University of Oregon, Eugene, Oregon. Curriculum: Concentration in statistical theory, urban economics, and policy applications of economic analysis.