

**HOUSE COMMITTEE ON LAND USE**

**February 14, 2005 Hearing Room 50**

**1:30 P.M. Tapes 18 - 19**

**MEMBERS PRESENT:           Rep. Bill Garrard, Chair**

**Rep. Gordon Anderson, Vice-Chair**

**Rep. Mitch Rep. Greenlick, Vice-Chair**

**Rep. Robert Ackerman**

**Rep. Mary Nolan**

**Rep. Patti Smith**

**Rep. Mac Sumner**

**STAFF PRESENT:           Sam Litke, Committee Administrator**

**Lindsay Luckey, Committee Assistant**

**MEASURES/ISSUES HEARD:**

**Measure 37 Legal Issues - Informational Meeting**

**HB 2438 - Public Hearing and Work Session**

**Discussion for Consensus on Measure 37 – Work Session**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

**TAPE/#    Speaker                    Comments**

## TAPE 18, A

002 Chair Garrard Calls the meeting to order at 1:38 p.m. and opens an informational meeting on Measure 37 Legal Issues.

### MEASURE 37 LEGAL ISSUES – INFORMATIONAL MEETING

011 Stephanie Stiffler Special Counsel, Attorney General.

027 Stiffler Notes that their opinions are only binding to state government. Recalls the attorney general opinion issued for Measure 7 (2000) and discusses the difference in the current situation.

043 Stiffler Describes the department's priorities first in implementing Measure 37 and currently answering more specific questions as asked. Reports that some of their responses have been made public and they anticipate more will be. Defers to Richard Whitman.

077 Richard Whitman Oregon Department of Justice. Introductory comments on recommendations for areas of clarification by legislature or court.

091 Whitman Announces the first major issue is in regards to state statutes. Elaborates that it isn't clear who has the authority to waive state statutes, specifically ORS 215 which governs farm use on rural land. Notes that if local governments aren't allowed to waive state statutes they will be liable for payment.

118 Chair Garrard Asks if state ballot measures supersede existing statutes.

122 Whitman Responds that in this case it does not necessarily supersede existing statutes as the ballot measure is not a constitutional amendment, rather a statutory initiative adopted by voters.

128 Chair Garrard Asks if he thinks there are two statutes in conflict because of Measure 37.

134 Whitman

Believes there are tensions between Measure 37 and state statutes.  
Relays DOJ's task of interpreting the measure so that it is in accordance with the rest of ORS 197.

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|-----|----------------|---|
| 150 | Whitman        | Reports the second ambiguity that would benefit from clarification is a question of ownership. Elaborates on specific situations where land has transferred ownership raising a question of which date of ownership should apply.   |
| 173 | Chair Garrard  | Asks whether he would rather issue an opinion to have the courts debate or just let courts debate the issue.  |
| 178 | Whitman        | Responds that regardless of whether or not they issue an opinion there will be litigation over the measure. Adds that even if they don't issue a comprehensive opinion they are constantly issuing advice which is open to litigation.  |
| 198 | Rep. Greenlick | Asks if there are any ambiguities in what kind of government actions are covered under Measure 37.  |
| 203 | Whitman        | Responds affirmatively noting that some parts are very clear while others are not.  |
| 213 | Rep. Ackerman  | Comments that Measure 37 requires the filing of a cause of action in circuit court and asks if there are alternatives available to provide for a direct appeal to the court of appeals to circumvent the circuit court process.   |
| 219 | Whitman        | Responds that it is within legislative authority to do that but points out that the court of appeals usually reviews a record created by a circuit court or state agency.   |
| 229 | Rep. Anderson  | Asks how Whitman interprets the phrase "the governing body responsible for enacting the land use regulation" in Measure 37 (8).   |
| 240 | Whitman        | Responds that this language contributes to the first issue raised about state statutes. Elaborates that the term "governing body" is used elsewhere in ORS 197 and usually means the body responsible for adoption or enactment of a law. Explains who the body would be at various levels of government. |
| 258 | Rep. Anderson  | Comments that the legislature would be wise to delegate this responsibility unless it wants to pay compensation or waive statutes.  |

260	Whitman	Agrees and urges clarification of delegating authority.
265	Stiffler	Refers to Rep. Ackerman's previous question, commenting that ORS 293 has a review process in it that would likely apply to claims filed with the Department of Administrative Service (DAS), but under Measure 37, a separate circuit court process is authorized. Remarks that this would be a good place for clarification.
283	Chair Garrard	Asks for clarification on the process she just described.
291	Stiffler	Clarifies the process noting that using the same reasoning applied to their opinion for Measure 7 (2000), the same process would apply to Measure 37 claims.
300	Chair Garrard	Asks who created that.
301	Stiffler	Answers the legislature.
304	Whitman	Explains that it is a general process to deal with financial claims against the state.
306	Chair Garrard	Confirms that it is a broad process that would be adapted to this measure.
306	Stiffler	Agrees citing its use with DAS.
307	Rep. Ackerman	Asks what happens when there are appeals at various levels appealing multiple bodies from the same decision.
308	Stiffler	States its possible.
309	Rep. Ackerman	States the necessity of having a consistent appeal process for every claim.
310	Stiffler	Comments it would be helpful to clarify this point.
315	Whitman	Adds that this raises a general question of what a claimant should do if contradicting opinions were issued by two separate bodies.

326	Rep. Anderson	Asks if the state were to delegate to lower levels of government, how they would deal with state agencies who have permits that would be involved with Measure 37.
334	Whitman	Responds that it would be best to “cover both bases”.
348	Chair Garrard	Comments on the “bottleneck” of proceeding and asks if there is urgency in the department to issue some opinions with regards to Measure 37.
378	Stiffler	Responds affirmatively. Elaborates on the work currently being done.
384	Chair Garrard	Asserts that through DLCD they indirectly control local government.
389	Whitman	Discusses the coordination between state and local government and the conscious effort to provide guidance and not dictate action.

**TAPE 19, A**

011	Chair Garrard	Comments on the importance of helping local governments in timely manner and asks if there is a timeline when DOJ will begin to issue opinions.
031	Stiffler	Responds that what is issued publicly is not the choice of the DOJ but that they anticipate some advice being made public very soon.
038	Chair Garrard	Asserts that the DOJ has publicly noted that waivers would be non-transferable and asks for confirmation that it is their legal opinion.
044	Stiffler	Responds that it is their legal opinion and expects that opinion to be made public shortly.
047	Chair Garrard	Stresses the role of the DOJ as they begin the process of implementing Measure 37.
057	Chair Garrard	Asks if she thinks liability is a major issue.
059	Whitman	Responds that until determination is made on the authority to waive state statutes that it will remain an important issue.

060 Chair Garrard Closes informational meeting and opens public hearing on HB 2438.

**HB 2438 – PUBLIC HEARING**

073 Sam Litke Committee Administrator. Explains HB 2438.

100 Harlan Levy Oregon Association of Realtors. Speaks in favor of HB 2438. Submits and summarizes written testimony (**EXHIBIT A**).

155 Allen Johnson Attorney, representing Bandon Dunes Destination Resort. Submits written testimony and correspondence between DLCD (**EXHIBIT B**).

175 Johnson Asserts that the bill reinstates the exception process as it was originally written.

185 Johnson Refers to DLCD correspondence (**EXHIBIT B, Page 5**). Elaborates on the process and necessity of taking an exception.

255 Johnson Refers to (**EXHIBIT B, Page 9**) illustrating the success of the destination resort.

297 Chair Garrard Asks if Johnson intends to submit amendments.

300 Johnson Responds affirmatively, explains what the amendments would do and expresses willingness to accept the bill as written.

310 Chair Garrard Asks if Levy objects to the amendments.

311 Levy Responds that they do not object to the amendments as long as the consensus reached remains.

320 Art Schlack Association of Oregon Counties. Speaks in support of HB 2384.

353 Ron Eber Department of Land Conservation and Development. Reports that the department supports the HB 2384.

373 Chair Garrard Asks for their opinion on amending the bill.

- 375 Eber Responds that he has no objection.
- 376 Schlack Responds that he has not seen the proposed amendments but would have no objection if they do not derail the bill.
- 380 Chair Garrard Closes the public hearing and opens the work session on HB 2438.

**HB 2438 – WORK SESSION**

- 400 Rep. Anderson MOTION: Moves HB 2438 to the floor with a DO PASS recommendation.**

**VOTE: 7-0-0**

**AYE: In a roll call vote, all members present vote Aye.**

- 410 Chair Garrard The motion CARRIES.**

- 413 Chair Garrard Closes and reopens the work session on HB 2438.

- 415 Rep. Greenlick MOTION: Moves HB 2438 be placed on the CONSENT CALENDAR.**

**VOTE: 7-0-0**

- 420 Chair Garrard Hearing no objection, declares the motion CARRIED.**

- 422 Chair Garrard Closes the work session on HB 2438 and opens a work session for the purposes of discussion and consensus on Measure 37.

**DISCUSSION FOR CONSENSUS ON MEASURE 37 – WORK SESSION**

**TAPE 18, B**

- 003 Chair Garrard Invites committee members to share thoughts and proposed directions for dealing with Measure 37.
- 013 Rep. Greenlick Expresses concern that Measure 37 inhibits cities and counties from effectively zoning and planning in the future. Asserts necessity to

allow Measure 37 to compensate for grievances without being ruled by the “tyranny of the minority”. Cites recent example of constrained necessary planning in Portland due to Measure 37 concerns.

- 051 Rep. P. Smith Understands what Rep. Greenlick has stated but refers to the message sent by voters in two elections. Believes the committee has an “opportunity” to clarify the language of the measure. Comments that much of the testimony they heard is from those who have been involved in “writing the rules” and reiterates the importance of minding voters’ concerns.
- 069 Rep. Greenlick Believes Rep. P. Smith raises an important issue. Addresses a distinction between logic suggesting that honoring the voters’ intent entails making changes to the measure as opposed to honoring the voters’ intent by leaving the language of Measure 37 the same and letting litigation determine the outcome. Asserts voters didn’t intend for the implementation of the exact language of Measure 37.
- 090 Rep. P. Smith Responds that she has been misinterpreted. Reiterates the opportunity to clarify voters’ intent.
- 097 Rep. Nolan Notes her agreement with Rep. P. Smith in her point on having an “opportunity”. Comments on the diversity of opinions in Oregon and submits that all the voters that voted yes on this measure did not have the same objective in mind. Suggests that members, both individually and collectively plan meetings outside of Salem to listen to constituents and raise the concerns the committee has. Stresses need to respect and honor voters’ will as well as existing guidelines at state and local levels.
- 150 Rep. Anderson Relays interpretation of people’s intent from town hall meetings held in his district. Notes opinion that some people were hurt by land use planning and that Measure 37 is a “one shot deal” to rectify those infringements. Asserts that unless state agencies are involved, counties should be in charge of waiving or compensating. Urges discussion of liability and transferability issues within the committee.
- 213 Rep. Greenlick Confirms Anderson’s belief that people voted for things that happened in the past, not that could happen in the future.
- 215 Rep. Anderson Confirms.
- 220 Rep. Nolan



Elaborates on this reasoning and asks if they are suggesting a time limit on when people can make claims in order to rectify grievances but not inhibit future development plans.

236	Rep. Greenlick	References his opposition to the bill and elaborates on understanding of future implications of the bill.
350	Rep. Anderson	References Measure 37 (5) and notes its limitation for applications. Notes the implication that it wouldn't transfer to people in the future.
260	Rep. Ackerman	Discusses role of legislature in fixing elements of Measure 37. Contends that they are "off track" in several ways and outlines issues to isolate and deal with: <ul style="list-style-type: none"><li>• · Standardize claims process or elements of claims process</li><li>• · Standardize court process</li><li>• · Consider time limits to file claims</li><li>• · Transferability issue of waiver and possible time limit</li><li>• · Issues of finance</li></ul>
307	Rep. Sumner	Comments on number of voters in his district who voted for Measure 37 and the number of people who would be affected by it. Notes issues where Measure 37 will not apply. Discusses transferability and compensation issues. Comments on local ordinances in place to cover eventualities. Reiterates need to implement a workable system.
374	Rep. Anderson	Relays a suggestion to compare county proposals to look for continuity.
397	Chair Garrard	Asks Art Schlack to provide county applications.
398	Art Schlack	Association of Oregon Counties (AOC). Responds that they can provide that information.
400	Rep. P. Smith	Asks if there has been feedback from Multnomah county to present their actions on Measure 37 claims.
403	Chair Garrard	Responds they are currently in discussions and asks staff to contact the Multnomah Planning Department.

**TAPE 19, B**

014	Rep. Nolan	Asks if AOC will compile the information from all counties.
016	Chair Garrard	Confirms, noting that not all counties have made their information available.
022	Rep. Ackerman	Believes they have heard sufficient testimony and is uncertain of the benefit in looking over applications. Would prefer a list of things that they felt should be standardized and those things left to local control.
034	Rep. Nolan	Clarifies that her understanding would be to have a review or analysis of the implementing ordinances the counties have put in place. Continues that they would look for continuity and decide which issues are of statewide concern and which should be left to local control.
059	Chair Garrard	Reiterates the importance of local flexibility. Suggest using Rep. Ackerman's proposal as a base to begin evaluations.
067	Rep. Ackerman	States concern that counties aren't addressing some of his concerns.
070	Chair Garrard	Suggests using Rep. Ackerman's database to establish questions.
073	Rep. Ackerman	Agrees and mentions he will have bills coming out to address some of these issues.
082	Rep. P. Smith	Notes filing deadline of February 28th.
080	Rep. Greenlick	Comments on representative democracy and the challenge of balancing majority and minority interests. Notes the benefit the land use system has had on real estate values and asserts the potential for a gradual degradation of land value for everyone. Concedes some bad decisions made in land use planning in the past and the asserts the need to correct those. Reiterates the problems if cities and counties are unable to plan effectively for their communities in the future.
155	Chair Garrard	Confirms that the feelings Rep. Greenlick expressed are shared by the committee members.
158	Rep. Anderson	Comments that Oregon's land use laws are far more restrictive than the rest of the nation and expresses interest in bringing them back into balance while attracting more employers.

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Chair Garrard

Closes work session on Discussion for Consensus on Measure 37 and adjourns the meeting at 3:13 p.m.

**EXHIBIT SUMMARY**

- A. **HB 2438, written testimony, Harlan Levy, 2pp.**
- B. **HB 2438, written testimony, Allen Johnson, 11pp.**
- C. **HB 2438, written testimony, Ron Eber, 1p.**