

## **HOUSE COMMITTEE ON LAND USE**

**February 07, 2005 Hearing Room 50**

**1:30 PM Tapes 13 - 15**

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

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

**Rep. Mitch 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 & WITNESSES:**

#### **Measure 37 Implementation – Informational Meeting**

**Ben Boswell, Wallowa County**

**Tom Brian, Washington County**

**Scott Cooper, Crook County**

**Micheal Benedict, Hood River County**

**Keith Cubic, Douglas County**

**Dan Olson, Washington County**

**Mark Pilliod, Deschutes County**

**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.**

<b>TAPE/#</b>	<b>Speaker</b>	<b>Comments</b>
---------------	----------------	-----------------

**TAPE 13, A**

002	Chair Garrard	Calls the meeting to order at 1:34 PM and opens an informational meeting on Measure 37 implementation.
-----	---------------	--

**MEASURE 37 IMPLEMENTATION – INFORMATIONAL MEETING**

005	Ben Boswell	Commissioner, Wallowa County. Reviews Wallowa County's draft ordinance to address Measure 37 implementation issues. Some specifics include: <ul style="list-style-type: none"><li>• Similarity to State Administrative Rule in anticipation of joint filing at state and county level</li><li>• Burden of proof on claimant</li></ul> Has questions on owners with partial interest in claims process.
061	Chair Garrard	Asks if Wallowa County claims request the claimant's desired compensation.
063	Boswell	Believes it's a 2-3 step process and that a determination on compensation should be made before considering regulatory relief.
068	Chair Garrard	Clarifies that they will deny compensation before considering other 3 choices.
072	Boswell	Replies they may accept compensation or move on to another choice but that the process is still uncertain. Continues description of process.
089	Boswell	Notes addition of clause relating to "moment of time" premise.
093	Rep. Smith	Questions if claims denied because of incompleteness can be re-filed.

095	Boswell	Answers affirmatively.
099	Boswell	Continues, stating Wallowa County's position that regulatory relief is transferable.
103	Chair Garrard	Asks what the decision to allow transferability is based on.
106	Boswell	Responds that the decision is based on the "common sense approach to Measure 37" and their legal counsel advice.
109	Boswell	Continues detailing ordinance citing their: <ul style="list-style-type: none"> <li>• Allowance to extend 180 days</li> <li>• Willingness to coordinate with other jurisdictions</li> <li>• Requirement for an appraisal only if they decide on compensation</li> <li>• Intention to set up compensation fund</li> <li>• Proposed \$200 review fee</li> </ul>
135	Rep. Smith	Asks on what basis they decided to allow for extensions past 180 days.
137	Boswell	Responds that it is "common sense". Elaborates that it is in the claimant's best interest to file a valid claim taking longer than 180 days if necessary.
147	Rep. Greenlick	Questions his approach when "common sense" conflicts with law.
153	Boswell	Responds that if explicitly stated, they will follow the law but lacking other guidance, they will use their discretion.
158	Rep. Greenlick	Responds that the 180 day limit does not seem ambiguous.
162	Boswell	Believes he may have been misinterpreted and reads pertinent lines from ordinance.
166	Rep. Greenlick	Acknowledges answer, stating his previous impression that they would go on with or without the claimant's agreement.
170	Boswell	

States the County's desire to review completed claims and their intention to enter into negotiations with claimant to extend deadline if necessary.

173	Rep. Sumner	Asks how the \$200 fee was determined and if it is adequate to do the required work.
178	Boswell	Responds that the fee was chosen arbitrarily and that it is not enough.
202	Rep. Anderson	Asks how many applications they've had and an estimation of time needed to investigate.
207	Boswell	Replies that they have three applications but are uncertain of how much time is required. Reviews content of claims and notes lack of guidance in proceeding with claims.
218	Chair Garrard	Asks Boswell for the top three actions he'd like to see come from a state agency or the legislature in regards to Measure 37.
223	Boswell	Replies that he'd like clarification on: <ul style="list-style-type: none"><li>• The "point in time" question of reapplying repealed legislation and</li><li>• Transferability of waivers</li></ul>
234	Rep. Nolan	Refers to Boswell's earlier statement that he believes transferability is allowed for under Measure 37 and questions what he'd like to see changed.
240	Boswell	Responds that he may have been misunderstood but that his intent was to say that lacking other guidance they are "leaning towards agreeing with" the option of transferability.
253	Tom Brian	Chairman, Washington County Board of Commissioners. Gives an overview of Washington County. Reports that they have about 60 claims to date and believes they will receive more than most counties.
286	Brian	Describes where the claims are being filed and what the intentions for the land are. States that the majority wish to build one to three homes on rural farm and about one third wish to do subdivisions.

312	Brian	Quantifies cost of compensation for claims at \$55 million while conceding that the county does intend to compensate. Remarks that most <ul style="list-style-type: none"> <li>• claims appear to be valid,</li> <li>• claims will require a companion state claim,</li> <li>• claimants don't know what specific regulation they would like to waive and</li> <li>• claimants are not represented by counsel.</li> </ul>
335	Brian	Notes that while they are anticipating legislative action and proceeding slowly.
360	Brian	Outlines claims process, explaining that a fee will not be collected for claims but will be combined with the permit process.
405	Brian	Comments that they are encouraging concurrent claim and development application filing. Remarks on uncertainty of the need to waive something if one has not yet been "denied" for a certain use.

#### **TAPE 14, A**

012	Brian	Reports that their ordinances are in draft form. Lists some major issues of concern including: <ul style="list-style-type: none"> <li>• · Transferability</li> <li>• · Liability to 3rd parties</li> <li>• · Locally adopted ordinances to implement federal environmental provisions</li> <li>• · Sewer and water support</li> </ul>
070	Brian	Advocates for standardization in process.
083	Sumner	Refers to earlier quote of \$ 55 million in compensable claims. Asks if there are estimates on how counties' tax bases would be enhanced if these are approved.
087	Brian	Responds that research has not been done. Adds their openness to working with claimants without becoming legal counsel.
115	Brian	Gives his opinion that some people are waiting until legislative action to file claims. Speculates some fairly major developments in forest land.

119	Rep. Anderson	Asks for clarification on the liability issue and for Brian's opinion on the public opinion of transferability.
121	Brian	Responds that a 3rd party liability problem could result from waiving rules and regulations in response to a claim and then having a 3rd party complain.
138	Brian	In response to the second question, he describes his process for determining "what people meant" including weighting if there was adequate public discussion, the amount of money on each side and the results of the vote. Concludes that he believes people were ultimately looking for property rights.
167	Rep. Anderson	Asks if the sewer and waste problem Brian discussed earlier couldn't be handled with existing Department of Environmental Quality regulations.
173	Brian	Describes the uniqueness of Washington County and concedes that the problem is not applicable in claims received thus far.
194	Rep. Greenlick	Comments that the value of land would increase if allowed to build houses on their farmland. Notes the deferment of property taxes for agricultural land. Asks if it is the expectation of the county to have claimants pay taxes based on residential values as opposed to agricultural value for the duration of ownership.
211	Brian	Responds that they have not taken a position though it is an emerging issue. Comments on some hypothetical situations.
233	Rep. Greenlick	Asserts that if the claimant is filing that the land should be residential and has been since 1975 they should be subject to residential property taxes from 1975.
241	Brian	Adds to the question noting that as it stands, owners of farmland are taxed for one acre and pay deferral on the rest. Responds that he has no answer to the question of a "catch up" on deferral. Believes there is a difference between a subdivision and building a second home on a farm.
262	Rep. Ackerman	Asks if the process requires an appraisal from the homeowner.
265	Brian	Answers no and describes their process.

282	Chair Garrard	Asks what Brian's three priority issues concerning Measure 37 are.
290	Brian	Answers that his issues include the following but also defers to Legal Counsel Dan Olson who will testify later. <ul style="list-style-type: none"> <li>• Liability of 3rd parties</li> <li>• Standardization</li> </ul>
316	Chair Garrard	Asks if Brian as a County Commissioner would be happy to see things go through circuit court.
320	Brian	Responds no. Asks if he's referring to appeals or in answering all these questions.
323	Chair Garrard	Replies that he's referring to the appeal process.
327	Brian	Says his answer depends on where the appeals would go. Believes that the court system would resist and would prefer to put court's time to criminal and civil issues. Suggests a hearings officer approach.
360	Chair Garrard	Comments he's asking because there are rumors of bills to address these issues.
369	Scott Cooper	Crook County. Submits written testimony, his county's ordinance and court case information ( <b>EXHIBIT A</b> ). Reports on the number of claims his county has received, their likelihood of being valid, and the types of requests, noting all have dealt with partitioning and subdivisions ( <b>EXHIBIT A, Page 1</b> ).
398	Cooper	Describes claim process reading from ( <b>EXHIBIT A, Page 2</b> ). Comments on risk taken by the county and the possibility of being fined by circuit courts. Cites this issue as their primary issue to be clarified.
410	Cooper	Continues reading from ( <b>EXHIBIT A, Page 2</b> ). Describes their hearing process and "fall back procedure" in case of error by hearings officer.

#### **TAPE 13, B**

010	Cooper	Encourages concurrent hearing for claims and development plans. ( <b>EXHIBIT A, Page 3</b> ). Explains why they have no upfront fee.
-----	--------	--

044	Cooper	Summarizes the initial public response, misconceptions and actions regarding Measure 37 ( <b>EXHIBIT A, Page 3</b> ).
058	Cooper	Notes that during the interim they filed a lawsuit under ORS 33.710 to “seek an opinion as to the legality, regularity and correctness of a local ordinance” and references the paperwork associated with it ( <b>EXHIBIT A, Page 18</b> ). Continues summarizing ( <b>EXHIBIT A, Page 3</b> ) with explanation of how the county would proceed if the court rules against them.
076	Cooper	<p>Gives list of six amendments desired from the legislature at this point (<b>EXHIBIT A, Page 3-4</b>) that would:</p> <ul style="list-style-type: none"> <li>• give local government authority to establish reasonable claims procedures</li> <li>• specify a uniform methodology for determining value</li> <li>• address the transferability of waivers</li> <li>• address whether a partion and subdivision constitutes a “use”</li> <li>• clarify the role of circuit court in seeing appeals</li> <li>• give flexibility to local jurisdictions</li> </ul>
109	Rep. Greenlick	Gives hypothetical situation of filing an incomplete claim and asks if it would be valid.
114	Cooper	Responds that it will be recognized as incomplete.
139	Micheal Benedict	Planning Director, Hood River County. Reports that his county passed a resolution, not an ordinance, in response to Measure 37. Discusses fees, validity of claims and options for public hearings. Notes intention not to pay compensation but will allow 3rd party compensation. Also describes the process of issuing ministerial denial.
164	Benedict	Recounts Hood River County’s narrower victory and comments that while they provide “full customer service” they don’t help to fill out claims as this has been deemed legal advice. Describes the information made available to the public.
177	Benedict	States their encouragement for claimants to file with the state concurrently.
188	Benedict	Describes the number of claims and estimated monetary value, stating that all claims are for partitions or subdivisions.



194	Benedict	Asserts that their county will proceed by assessing risk. Notes that legal fees could be quite substantial for a small county.
202	Benedict	Issues main questions including: <ul style="list-style-type: none"> <li>• Transferability</li> <li>• Role of circuit court appeals and legal fees</li> <li>• Federal laws and endangered species acts</li> </ul>
224	Benedict	States their plan to give public notice using the same standards as with land use decisions. Points to a new requirement from Department of Administrative Services to provide lists and the extra burden their office would incur.
235	Rep. Smith	Asks if the eight claims they've had have also applied to the state as recommended by the county.
239	Benedict	Is unsure, but believes some have.
242	Rep. Smith	Refers to testimony from the state on the number of their claims and wonders about the possibility for duplication of the number of claims.
252	Keith Cubic	Planning Director Douglas County. Submits packet containing local observations about implementing Measure 37 ( <b>EXHIBIT B</b> ). Reviews preliminary concerns from the county including public will, protection of local planning and avoidance of land use decisions.
274	Cubic	References ( <b>EXHIBIT B, Page 4</b> ). Describes 3 claim scenarios and their outcomes. Notes misunderstanding among the public. Comments that the term "waiver" is not in the law, rather "modify", "not apply" or "remove".
300	Cubic	References a list of "Ballot Measure 37 Interpretive Issues" ( <b>EXHIBIT B, Page 5</b> ) and highlights two areas their county deem necessary to address in order to successfully implement the measure including: <ul style="list-style-type: none"> <li>• The essentiality to have a Measure 37 procedure that requires adequate information.</li> <li>• A "bare bones" approach to an ordinance.</li> </ul>
310	Cubic	Points to a copy of Douglas County's claim form ( <b>EXHIBIT B, Page 6</b> ) and states it bears similarities to the state form. Notes that the greatest difficulty is coming from justification or documentation of

reduction of fair market value in part because the appraisers in the area will not take these claims.

337	Cubic	Highlights Douglas County's implementing ordinance ( <b>EXHIBIT B, Page 11</b> ). Notes that at their public hearing for the ordinance, two sections (provisions for notice and mitigating standards) were delayed adoption.
374	Cubic	Describes unique elements of Douglas County's claims process. ( <b>EXHIBIT B, Page 15</b> ). Comments that in practice a waiver will be granted to all valid claims in lieu of compensation.
390	Cubic	Continues description of claims process and who has the authority in reviewing and investigating claims.
406	Cubic	Comments on dual claims with the state.

#### **TAPE 14, B**

009	Cubic	Mentions that they charge no application fee, but that there is a \$350 archival research fee unless claimant wished to undertake the research themselves.
015	Cubic	Reports that they've received three claims of which one will be denied and two will likely be approved. Also reports that six inquiries have been diverted to file land use claims.
033	Cubic	Reiterates the difficulty of getting appraisals.
048	Cubic	Offers a solution and qualifies his remarks as his professional opinion and comments on long history in Oregon land use. Believes that the significant reasons Measure 37 arose are the following: <ul style="list-style-type: none"><li>• Absence of "dwellings by right".</li><li>• "unyielding statewide minimum parcel size".</li><li>• difficulty with exceptions.</li></ul>
065	Cubic	References ( <b>EXHIBIT B, Page 20</b> ) as the six key issues related to possible legislative change and points out his top three: <ul style="list-style-type: none"><li>• Waiver transferability</li><li>• Statute of limitation on claims</li><li>• Clarification of exemptions</li></ul>

100	Cubic	References <b>(EXHIBIT B, Pages 21-22)</b> as a list of questions developed by the Association of Oregon Counties Planning Directors for the Department of Land Conservation and Development.
104	Rep. Nolan	Asks if it was his opinion that a regulation would be considered applied the moment it became effective while one might argue that it is not effective until someone seeks a permit.
110	Cubic	Agrees and elaborates that it is a flaw and would like the regulation to be considered applied when it is adopted.
115	Rep. Nolan	Asks if there is a property tax assessment applied to the land based in part on zoning, specifically Exclusive Farm Use (EFU) zoning.
122	Cubic	Answers that EFU zoning is specified in ORS 215. Explains that normally one does not pay tax penalty until use is changed. Also notes that there is a 10-year maximum penalty phase.
137	Chair Garrard	Asks how he would handle a land use application when the use is prohibited by state and county law.
142	Cubic	Responds that if the county eventually waived, the county would not issue a building permit until the state waived also.
160	Dan Olson	County Counsel, Washington County.
170	Olson	Enumerates issues of legislative concern, broadly, a definition of minimum requirements under the ordinance, specifically: <ul style="list-style-type: none"> <li>• Would like to require all owners to sign application</li> <li>• Would like claimant to identify regulations they want waived</li> </ul>
190	Olson	Reports Washington County's policy of free application and encouragement of conjoining the development review process with the claim process. Continues with specific issues to be clarified. <ul style="list-style-type: none"> <li>• Definition of enforcement</li> </ul>
204	Rep. Smith	Asks what constitutes enforcement or application when a claimant has been given verbal denial but never a written notice.

213	Olson	Responds that a verbal exchange may be enough. Elaborates on possible options for clarification.
227	Olson	Continues with the question of what local government can require property owners to do, if anything, before a court proceeding. Comments on cooperativeness of those with and without legal counsel.
252	Olson	<p>Gives three choices he sees to address the local process issue:</p> <ul style="list-style-type: none"> <li>• Permit local government to adopt “reasonable” standards</li> <li>• Require by state law a specific process</li> </ul> <p>Or he believes the simplest would be to:</p> <ul style="list-style-type: none"> <li>• Require all information for the circuit court proceeding to be on the record.</li> </ul>
281	Olson	Believes Measure 37 should specify where the claim must be filed.
295	Olson	<p>Believes some exceptions need clarifying including:</p> <ul style="list-style-type: none"> <li>• A distinction that flood plain ordinances are health and safety regulations.</li> <li>• The ability to delegate from the governing body</li> </ul>
310	Olson	<p>Comments on further uncertainties including:</p> <ul style="list-style-type: none"> <li>• the provision which allows for payment if the case has not been seen after 2 years.</li> <li>• The status of prior land use rules</li> <li>• Issuing builder’s permits without a waiver</li> <li>• Legal status of the waiver</li> </ul>
349	Chair Garrard	Comments on the apparent need for standardization but inclusion of local flexibility.
356	Olson	Responds that it is also for the benefit of the property owners.
359	Mark Pilliod	Legal Counsel, Deschutes County. Submits a spreadsheet outlining Measure 37 claims in Deschutes County ( <b>EXHIBIT C</b> ).
382	Pilliod	Highlights the number of claims (17) received, summarizes their proposed use and speculates on the claimants intent ( <b>EXHIBIT C</b> ).

399	Pilliod	Reiterates previous speakers' testimony about uncertainty. Comments on Deschutes County ordinance and their experience in having incomplete claims.
-----	---------	---

**TAPE 15, A**

030	Pilliod	Elaborates the desire to have a completeness of the project in mind when evaluating claims rather than piecemeal claims filed.
-----	---------	--

039	Pilliod	Concludes that if there is not legislative action, decision making will be left to the court. Encourages the committee to consider the future of land use and enacting any future land use planning.
-----	---------	--

065	Chair Garrard	Asserts that the legislature has made attempts which have been denied along the political process.
-----	---------------	--

068	Rep. Smith	Asks what percentage of Oregon is zoned EFU.
-----	------------	--

073	Chair Garrard	Estimates around 70%.
-----	---------------	-----------------------

076	Rep. Smith	Notes that with the high percentage, it is not surprising that most of the claims are there.
-----	------------	--

079	Pilliod	Comments that vast majority of Deschutes County land is held by state and federal government.
-----	---------	---

085	Chair Garrard	Gives a hypothetical example in which a high water table would prohibit someone from building a house on EFU land, and asks if this would be the outcome.
-----	---------------	---

090	Pilliod	References Claims 5 and 6 ( <b>EXHIBIT C</b> ) which were claimed disapproved septic and comments on the time of measurement. Measure exempts out certain types of regulations including sanitary regulations and submits that if they can't satisfy them they shouldn't be entitled to a residential permit.
-----	---------	---

107	Rep. Ackerman	Asserts that it is essential to have a certified appraisal.
-----	---------------	---

116	Rep. Greenlick	Points out that most claims are rural subdivisions not rural farmland residence.
-----	----------------	--

118	Pilliod	Concurs.
132	Chair Garrard	Adjourns the meeting at 3: 31 PM.

### **EXHIBIT SUMMARY**

- A. **Measure 37 Implementation, written testimony, Scott Cooper, 24 pp.**
- B. **Measure 37 Implementation, local government observations, Keith Cubic, 25 pp.**
- C. **Measure 37 Implementation, Deschutes County Claims, Mark Pilliod, 1 p.**