

May 20, 2015

**Written Testimony before the
Joint Committee on Implementing Measure 91
Regarding the Dash-1 Amendments to House Bill 3400**

Co-Chairs Burdick and Lininger, and Members of the Committee,

Thank you for the opportunity to comment on the Dash-1 amendments to House Bill 3400. Although it has only been two days since those extensive amendments were unveiled, I have vetted them through a number of county affiliate groups, and asked for prompt analysis and feedback, most notably including the Oregon County Counsels Association (OCCA) and the Association of Oregon County Planning Directors (AOCPD). As a result, here are the initial comments, concerns, and suggestions of the Association of Oregon Counties (AOC):

1. Preemption

Section 33 flips Section 58 of Measure 91 on its head. It changes it from an inconsistency preemption clause to a global preemption clause (essentially changing “show me where I can’t” to “show me where I can”). As explained in the LOC/AOC [legal opinion](#) dated March 4, 2015, that is not how the mirror provisions of the Liquor Control Act have worked. Further, in conjunction with Section 58, which amends Section 60 of Measure 91, this section purports to preempt locally elected governing bodies from opting out of any category of state licensed marijuana business, arguably leaving opt out confined exclusively to the specified initiative petition and election route. Again, that is not how the Liquor Control Act works, upon which Measure 91 was modelled.

No other state with licensed marijuana businesses has preempted locally elected governing bodies from opting out of marijuana businesses. Indeed, local control is enshrined in the [Colorado Constitution, Art XVIII, Sec 16\(5\)\(f\)](#), and has been [vigorously](#) and [successfully](#) defended by the Washington Attorney General. There are a number of good reasons for that.

Oregon should not depart from the Liquor Control Act model, chart a course different than any other state, and force a confrontation of the federal question that threatens the entire licensing scheme. See written [testimony](#) dated February 16, 2015 (pages 11 through 16) and LOC/AOC [legal opinion](#) dated March 4, 2015, part III (page 8).

Sections 33 and 58 should be removed from the bill, leaving Sections 58 and 60 of Measure 91 to operate as written, just like the Liquor Control Act. *The proposed amendments attached to this testimony would do just that.* Alternatively, those sections could be replaced to state clean and clear authority for locally elected governing bodies to opt out of any category of state licensed marijuana business. See [Colorado Constitution, Art XVIII, Sec 16\(5\)\(f\)](#).

2. Local Time, Place, and Manner Regulations

Section 34 completely rewrites Section 59 of Measure 91. As explained in the LOC/AOC [legal opinion](#) dated March 4, 2015, Section 59 of Measure 91 currently operates as supplemental authority for local regulations relating to the nuisance aspects of marijuana businesses. In conjunction with Section 33, the rewrite purports to define and chart out what constitutes “reasonable” time, place, and manner regulations. OCCA and OACPD members noted that, while “place” regulations include all categories of state licensed marijuana businesses, the “time” and “manner” regulations only include retailers. That will cause problems, particularly with regard to “manner.”

For example, a licensed producer, processor, or wholesaler could create a significant nuisance to their neighbors, and local government would arguably be powerless to do anything about it, thus creating a special class of business exempt from the normal operation of nuisance laws for which every other business must comply.

We therefore strongly urge the addition of a new paragraph (c) to subsection (1) of Section 34, to read as follows:

“(c) Reasonable conditions on the manner in which a marijuana producer, processor, or wholesaler licensed under sections 19, 20 or 21, chapter 1, Oregon Laws 2015, may produce, process, or wholesale marijuana;”

The proposed amendments attached to this testimony include that change.

3. Land Use

Section 35 relates to land use issues. OCCA and OACPD members noted concerns with subsections (2), (3), and (4).

Subsection (2) is not well written. In conjunction with provisions of ORS chapter 215, administrative rules, local ordinances, and case law, it leaves a number of serious ambiguities. We think we know what subsection (2) is trying to do, and propose the following alternative language to better accomplish that purpose uniformly across the state:

“(2) Notwithstanding ORS 215.213 and 215.283, a new dwelling in conjunction with a marijuana crop is not permitted in any area zoned for exclusive farm use.”

Subsections (3) and (4) are simply unnecessary, and create potential confusion. Subsection (3) attempts to restate certain processing authority on EFU lands. But it only references conditional use processing, and completely misses outright permitted processing. We don’t think that is the intent. The provisions of ORS chapter 215 already cover this. Subsection (4), relating to home occupations, is already covered by ORS 215.448. Subsections (3) and (4) should be removed.

The proposed amendments attached to this testimony would make the changes described above.

4. Tax Distribution

Sections 69 to 80 completely redo the Measure 91 tax provisions, and provide instead for a retail tax. That makes sense. However, Section 80 fails to modify the tax distribution formula in Section 44 of Measure 91. That formula still suffers from the same flaws that have previously been discussed before the Committee, most notably by failing to direct resources to the areas of most disparate impact. I took a shot at an alternative in my [testimony](#) dated April 20, 2015 (*see* Sections 19 and 21 on pages 10 through 13). I would encourage the Committee to take a second look at what I crafted.

Thank you again for the opportunity to comment on the Dash-1 amendments to House Bill 3400. We will continue to look at those amendments and offer further input as things progress.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rob Bovett', with a stylized flourish at the end.

Rob Bovett
AOC Legal Counsel

**PROPOSED AMENDMENTS TO
HOUSE BILL 3400**

On page 1 of the typed amendments to House Bill 3400 dated May 18 (HB 3400-1), line 6, delete “58” and “60”.

On page 33, delete lines 18 through 30 and insert:

“NOTE: Section 33 was deleted by amendment. Subsequent sections were not renumbered.”

On page 34, delete lines 1 through 8.

After line 24, insert:

“(c) Reasonable conditions on the manner in which a marijuana producer, processor, or wholesaler licensed under sections 19, 20 or 21, chapter 1, Oregon Laws 2015, may produce marijuana;”.

In line 25, delete “(c)” and insert “(d)”.

In line 28, delete “(d)” and insert “(e)”.

On page 35, delete lines 16 to 27 and insert:

“(2) Notwithstanding ORS 215.213 and 215.283, a new dwelling in conjunction with a marijuana crop is not permitted in any area zoned for exclusive farm use.”

In line 28, delete “(5)” and insert “(3)”.

On page 45, delete lines 4 through 30 and insert:

“NOTE: Section 58 was deleted by amendment. Subsequent sections were not renumbered.”

On page 46, delete lines 1 through 8.