

1 **BEFORE THE BOARD OF COMMISSIONERS**
2 **FOR LINCOLN COUNTY, OREGON**

3
4 In the Matter of)
5)
6 *The Ballot Measure 37 Claim of*) **ORDER NO. 3-06-78**
7 *Carl and Carolyn Yaeger*)
8 *File No. 28-LURCC-05*)
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11 WHEREAS on November 2, 2004, the voters of the State of Oregon approved Ballot
12 Measure 37. The Measure amends ORS Chapter 197 to require, under certain circumstances,
13 actions to address claims of owners of real property if government land use regulations reduce fair
14 market property value; and

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16 WHEREAS Ballot Measure 37 provides that to maintain a claim, an owner of real property
17 must make a “written claim for compensation” to the government entity enacting, enforcing or
18 applying a land use regulation that allegedly restricts the use of the owner’s property and has the
19 effect of reducing its fair market value; and

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21 WHEREAS Ballot Measure 37 authorized the County to adopt and apply claims
22 procedures with certain limitations; and

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24 WHEREAS Ballot Measure 37 requires payment of just compensation for a valid claim
25 that reduces fair market value of real property or, in the alternative and in lieu of payment of just
26 compensation, allows the County to modify, remove or not apply the land use regulation allegedly
27 supporting a claim reducing a property’s fair market value; and

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29 WHEREAS Ballot Measure 37 imposes a duty on the County to review claims for
30 compensation and make decisions on those claims. A determination to modify, remove or not
31 apply a land use regulation or compensate a property owner must be based on substantial factual
32 information and analysis; and

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34 WHEREAS the County recognizes that Ballot Measure 37 contains many unclear and
35 ambiguous provisions and that future litigation or legislative action will be necessary to clarify the
36 measure’s terms. The County, therefore, adopted procedures in Board of Commissioners Orders
37 12-04-318 and 4-05-120 to assess claims in a timely manner and to require factual and analytical
38 information as part of the claim so the County will have a rational basis for its decision on each
39 claim; and

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41 WHEREAS on September 29, 2005, Carl and Carolyn Yaeger, filed a Measure 37 claim
42 seeking compensation or the modification, removal or non-application of land use regulations
43 (“waiver”) on their property. The current zoning of their property is R-1, single family residential,

1 and it is located within the Otter Rock rural community boundary. In addition, the property is
2 within the Coastal Shorelands boundary and is subject to the restrictions of the C-S overlay zone
3 for areas of exceptional aesthetic quality. The claimants state that their desired remedy to the
4 claim is the removal or modification of the restrictions of the C-S overlay. The property is 27.35
5 acres in size, and is located immediately north of the Sea Crest development at Otter Rock. It is
6 identified as tax lot 401 on Lincoln County Assessor's Map 9-11-29. The property consists of an
7 open grassy headland area adjoining the ocean shore bluff, bordered by steeply sloping forested
8 uplands to the east. County records and the filed claim are found in Lincoln County Planning
9 Department File No. 28-LURCC-05 and by this reference are incorporated into this Order as if
10 fully set forth; and

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12 WHEREAS after notice to surrounding property owners in accordance with Order #4-05-
13 120, a hearing was held on December 8, 2005, on the claim before the Planning Director as
14 Hearings Officer for the purpose of receiving facts and evidence related to determining the
15 validity of the claim. The claimants provided testimony in support of the claim. Valerie Sovern,
16 an adjacent property owner, provided testimony in opposition to the claim. Ms. Sovern also
17 submitted written testimony in opposition to the claim.

18
19 WHEREAS the Planning Director has issued his Department's Staff Report and
20 Recommendation that is attached to this order as Exhibit "A" and by this reference incorporated
21 herein. That report finds and concludes that the claim when submitted was valid and recommends
22 that the Board, lacking funds for compensation, in the alternative modify, remove or not apply the
23 subject land use regulations: staff recommends that the Board direct that the use restrictions of the
24 of the C-S overlay zone enacted in 1980 not be applied to the subject property. This would allow
25 the claimants to divide the subject property into residential parcels and/or develop other uses on
26 the property as was permitted at the time of the claimants' acquisition of the subject property in
27 1979. This allowance would, in accordance with the requirements of Subsection (8) of Ballot
28 Measure 37, allow the owners to use the property for a use permitted at the time of the owners'
29 acquisition of the subject property; and

30
31 WHEREAS the Board has considered the report and recommendations of the Planning
32 Director and County Counsel, including the implications known at this time concerning
33 ambiguous provisions in Measure 37 which are and will continue to be subject to judicial
34 clarification for the foreseeable future. Given that status, the Board desires to proceed cautiously
35 with processing this Measure 37 claim. Therefore, the Board will decide this Measure 37 claim
36 after placing the claimants on notice of possible future court decisions and interpretations; and

37
38 WHEREAS based on what is known at this time, the Board finds it is in the public interest,
39 due to the lack of resources to pay compensation, to modify, remove or choose not to apply the
40 challenged land use regulation to the subject property and issue the "waiver" to claimants;

41
42 NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1 1. Claimants Carl and Carolyn Yaeger are placed on notice that Oregon courts continue to
2 interpret provisions in Measure 37 which may change the way claims are treated. Claimants
3 proceed in this matter knowing that any action taken by the Lincoln County Board of County
4 Commissioners could be null and void if a court of competent jurisdiction interprets Measure 37
5 in any fashion which alters the Board’s approval. Lincoln County does not waive any rights or
6 remedies under law by granting a “waiver” under the law.

7
8 2. The Measure 37 claim of Carl and Carolyn Yaeger, Lincoln County Case File No. 28-
9 LURCC-05, was a valid claim when filed on September 29, 2005. The Board of Commissioners
10 declines to pay just compensation for the claim. In lieu of compensation, Lincoln County Code
11 Section LCC 1.1381 C-S overlay zone enacted by Lincoln County on June 30, 1980 (Ordinance
12 #139) is modified, removed or not applied for Carl and Carolyn Yaeger against the subject
13 property to the following effect:
14

- 15 • The non-application of regulations would be limited to the C-S overlay zone restrictions.
- 16 • Establishment of additional land parcels, dwellings, and other uses on the subject property
17 would be subject to all applicable public health and safety regulations, including but not
18 limited to land division procedures, building codes, on-site sewage disposal rules and
19 requirements, flood and geologic hazard area regulations, and state or county road
20 approach permit requirements.

21
22 3. A State of Oregon “waiver” under Measure 37 may be required for the development or
23 use of the subject property. Lincoln County lacks authority to waive state regulations or laws.
24 This Order does not affect any land use regulations of the State of Oregon. The claimants are
25 responsible for seeking compensation or “waiver” from the State of any applicable State laws.
26 The Planning Director shall send notice of the Board’s decision to the Director of the
27 Department of Land Conservation and Development. If a State Measure 37 claim is required, no
28 use, development, permits or other development applications will be processed or approved by
29 Lincoln County unless the State has issued, if appropriate, its own “waiver.”
30

31 4. This “waiver” provision is void if the property owners or property owners’ successors
32 are compensated by another governmental agency, including the State, for a reduction in value
33 resulting from the same or similar land use regulations on the subject property.
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35 5. Excepting new land use regulations imposed after the date of this decision, and subject
36 to applicable review rights as permitted under Measure 37, this final decision bars a subsequent
37 Measure 37 claim against the County as to the subject property.
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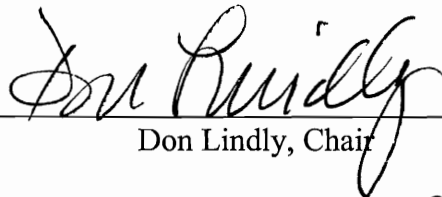
39 6. Transferability of the “waiver” granted by the County under this decision is unknown
40 under the current status of Measure 37. Transferability of the “waiver” is allowed to the extent
41 permitted by law. Granting of this “waiver” does not commit the County to issuance of
42 development or building permits, if those actions are not allowed under law.
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1 7. This Order be recorded in the Lincoln County Deed Records maintained by the Lincoln
2 County Clerk without payment of recording fees.

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4 8. Copies of this Order be provided to the Planning Director, County Counsel, claimants'
5 representatives and claimants.

DATED this 1st day of March, 2006.

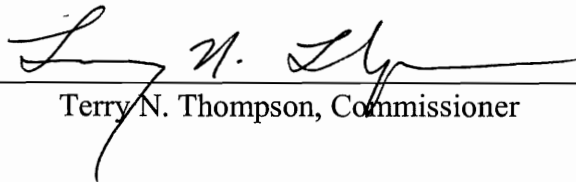
LINCOLN COUNTY BOARD OF COMMISSIONERS



Don Lindly, Chair



Bill Hall, Commissioner



Terry N. Thompson, Commissioner

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DEPARTMENT OF PLANNING AND DEVELOPMENT

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LAND USE REGULATION COMPENSATION CLAIM

PLANNING DIRECTOR'S STAFF REPORT and RECOMMENDATION

CASE FILE: 28-LURCC-05

DATE FILED: 09/29/05

CLAIMANT: Carl and Carolyn Yaeger; Litchfield & Carstens, agent.

REQUEST: The claimants seek compensation for, or the modification or removal of, land use regulations that establish development restrictions in areas of exceptional scenic quality.

A. REPORT OF FACTS:

1. **Lot Size:** 27.35 acres
2. **Property Location:** The property is located immediately north of the Sea Crest development at Otter Rock. It is identified as tax lot 401 on Lincoln County Assessor's map 9-11-29.
3. **Zoning Designation:** R-1 (Single Family Residential)
4. **Plan Designation:** Suburban Residential; Rural Community.
5. **Surrounding Land Use:** Immediately adjacent uses include the Sea Crest residential development to the south, the Lookout gift shop to the north and the Cape Foulweather View Estates development to the east.
6. **Topography & Vegetation:** The property consists of an open grassy headland area adjoining the ocean shore bluff, bordered by steeply sloping forested uplands to the east.

7. **Existing Structures:** None.

8. **Utilities:** The following utilities are available to serve the subject property:

- a. Sewer: H2O & S (private).
- b. Water: Johnson Creek Water Company (private)
- c. Electricity: Central Lincoln PUD.

9. **Development Constraints:** Areas of steep slopes and potential instability are identified on the subject property.

B. EVALUATION OF THE REQUEST:

1. Background:

Litchfield & Carstens, on behalf of property owners Carl and Carolyn Yaeger, filed a land use regulation compensation claim pursuant to Ballot Measure 37 on September 29, 2005. This claim was filed with the Department of Planning and Development in accordance with the procedure established for Ballot Measure 37 claims by Lincoln County Board of Commissioners Order # 12-04-318. The Yaeger property is located west of Otter Crest Scenic Loop road immediately north of the Sea Crest development in Otter Rock. The current zoning of the property is R-1, single family residential, and it is located within the Otter Rock rural community boundary. In addition, the property is within the Coastal Shorelands boundary and is subject to the restrictions of the C-S overlay zone for areas of exceptional aesthetic quality. The claimants assert a diminution in the value of the property resulting from the restrictions of the C-S overlay zone applied after their date of acquisition. The claimants state that their desired remedy to the claim is the removal or modification of the restrictions of the C-S overlay

Claimants assert an acquisition date of December 28, 1979, at which time the property was zoned R-1.

On December 8, 2005, a public hearing was held on the subject claim for the purpose of receiving facts and evidence related to determining the validity of the claim. Notice of the hearing was provided in accordance with Board of Commissioners order #4-05-120. The claimants' representative provided testimony in support of the claim. Valerie Sovern, an adjacent property owner, provided testimony in opposition to the claim. Ms. Sovern also submitted written testimony in opposition to the claim, which is included as a part the record considered in this report and recommendation.

2. Measure 37 Claim Requirements:

Measure 37 provides the following criteria for establishing eligibility for the supplemental right of compensation created by the measure:

- a. **Ballot Measure 37 provides for payment of compensation or relief from specific laws for “owners” of property, which is defined in Measure 37 as the “present owner of the property, or any interest therein.”**

The claimants, Carl and Carolyn Yaeger, acquired their current interest in the subject property on December 28, 1979 via a Memorandum of Contract, recorded at Book 109, page 1737 of the Lincoln County Deed Records. Records of the Lincoln County Assessor’s office confirm that Carl and Carolyn Yaeger remain the owners of the subject property.

- b. **A public entity enacts or enforces a land use regulation that restricts the use of private real property:**

Current land use regulations applicable to the subject property include the R-1 zone (LCC 1.1310), and the C-S overlay zone (LCC 1.1381). These regulations were enacted by Lincoln County and apply to the subject property, which is private real property. These regulations restrict the use of this private real property to only those uses expressly authorized. Specifically, in the case of the subject property, these regulations limit land divisions and place restrictions on the placement of buildings and other improvements.

- c. **The land use regulation has the effect of reducing the fair market value of the property:**

As noted, the currently effective requirements of the C-S overlay zone limit the development on the subject property to that which does “not substantially alter the scenic character of the area”. Claimants assert that these restrictions reduce fair market value of the property by \$3.42 million. In support of this claim, claimants have submitted a market analysis prepared by a licensed real estate broker. The calculation of the total value reduction attributable to current regulations appears to be based on certain undocumented assumptions. However, the information on its face, i.e. the market value difference between the current likely permissible development, versus the value based on the absence of the C-S overlay restrictions, leads the department to conclude that it is more likely than not that there has been at least some reduction in fair market value of the subject property as a result of the enactment and enforcement of the cited land use regulations.

- d. **The land use regulation complained of is not a regulation; (a) restricting or prohibiting activities commonly and historically recognized as nuisances under common law; (b) restricting or**

prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations; (c) required to comply with federal law; (d) restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing; or (e) enacted prior to the date of acquisition of the property by the owner or a family member of the owner.

The regulations addressed by the subject claim are the restrictions on development imposed by the C-S overlay zone. These regulations were enacted to comply with the Statewide Planning Goals. They do not directly address common nuisances, health and safety, adult businesses or activities, nor do they have any federal nexus.

The C-S overlay zone restrictions were enacted by Lincoln County on June 30, 1980 (Ordinance #139). The claimants have documented that their original interest in the property was acquired in December 1979, prior to the enactment of the cited land use regulations.

- e. **For claims arising from land use regulations enacted prior to December 3, 2004 (the effective date of Ballot Measure 37), written demand for compensation shall be made within two years of the effective date of the act.**

The land use regulations for which compensation is sought were enacted prior to the effective date of Ballot Measure 37 (Lincoln County has enacted no new land use regulations after December 3, 2004). The subject claim was filed on September 29, 2005, within two years of the December 3, 2004 effective date of Ballot Measure 37.

- f. **In lieu of compensation, the governing body may modify, remove or not apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.**

The claimant has documented a date of acquisition of 1979. For purposes of Section 8 of Measure 37, December 28, 1979 is the operative date for determining “a use permitted at the time the owner acquired the property.” As previously noted, the C-S overlay zone restrictions were enacted by Lincoln County on June 30, 1980.

C. Recommended Findings and Conclusions:

The director recommends for the Board's consideration the following findings and conclusions:

Findings:

1. Carl and Carolyn Yaeger filed a Land Use Regulation Compensation claim with the Lincoln County Department of Planning Development on September 29, 2005.
2. The claim is based on an assertion of a reduction in fair market value of real property due to the enforcement of land use regulations by Lincoln County.
3. The subject property is identified as tax lot 401 on Lincoln County assessor's map 9-11-29 which is taxed as real property by Lincoln County.
4. The C-S overlay zone (LCC 1.1381) provisions applicable to the subject property are land use regulations enacted and enforced by Lincoln County, a public entity.
5. The C-S overlay zone restricts uses; specifically, as applied to the subject property, it limits development which would substantially impact scenic values.
6. The claimants have asserted a diminution in value caused by the C-S overlay zone restrictions. Claimants have provided a market analysis from a real estate broker which estimates a value reduction attributable to land use restrictions of \$3.42 million. The county rejects this estimate of diminution of value as overstated in that is based on false assumptions regarding the intensity of development which could be achieved absent the C-S restrictions. Nonetheless, the record as a whole supports a finding that it is more likely than not that there has been some diminution in value as a result of the C-S overlay requirements enacted after the claimants' date of acquisition.
7. According to the Lincoln County Deed Records, the claimants, Carl and Carolyn Yaeger, first acquired an ownership interest in the subject property on December 28, 1979, and are the current owners of the property. The currently effective C-S overlay restrictions were enacted by Lincoln County on June 30, 1980 (Ordinance # 139), after the claimants' date of acquisition.
8. The C-S overlay zone restrictions are not encompassed within the definition of regulations excluded from compensation requirements, as set forth in Subsection (3) of Ballot Measure 37.

9. The subject claim was filed on September 29, 2005, which is less than two years from the December 3, 2004 effective date of Ballot Measure 37.

Conclusions:

Based on the above findings of fact, the Board reaches the following conclusions:

1. The subject claim for compensation for reduction in value of private real property from the enforcement of land use regulations was timely filed by the owners, Carl and Carolyn Yaeger, pursuant to Subsection (5) of Ballot Measure 37.
2. Based on the claimants' date of acquisition of December 28, 1979, the C-S overlay (LCC 1.1381) provisions of the Lincoln County Code are land use regulations enacted by Lincoln County prior to the effective date of Ballot Measure 37, and after the date of acquisition of the claimants; they restrict the use of the subject private real property; and they have the effect of reducing the fair market value of the property.
3. The owners of the property, Carl and Carolyn Yaeger, are therefore entitled to the payment of just compensation equal to the reduction in the fair market value of the subject property caused by the enforcement of the C-S overlay zone restrictions or, in lieu of the payment of just compensation, the Board, as the governing body responsible for the enactment of these land use regulations, may modify, remove or not apply these restrictions in order to permit the owner to use the property for a use permitted at the time of his acquisition.

D. Recommended Decision

Based on the preceding findings and conclusions that the subject claim is valid, resolution of the claim requires the payment of just compensation, or the modification, removal or non-application of the offending land use regulations. The selection of the remedy is at the discretion of the Board. Staff recommends that the Board choose the non-application of the subject land use regulations as the appropriate resolution for this claim. Specifically, staff recommends that the Board direct that the use restrictions of the of the C-S overlay zone enacted in 1980 not be applied to the subject property. This would allow the claimants to divide the subject property into residential parcels and/or develop other uses on the property as was permitted at the time of the claimants'

acquisition of the subject property in 1979. This allowance would, in accordance with the requirements of Subsection (8) of Ballot Measure 37, allow the owners to use the property for a use permitted at the time of the owners' acquisition. This recommendation is based on the following considerations:

1. No funds are currently budgeted in the county general fund for the payment of monetary compensation.
2. Not applying the currently effective restrictions of the C-S overlay zone is the claimants' desired resolution.

This recommended resolution would be subject to the following limitations:

- The non-application of regulations would be limited to the C-S overlay zone restrictions.
- Establishment of additional land parcels, dwellings, and other uses on the subject property would be subject to all applicable public health and safety regulations, including but not limited to land division procedures, building codes, on-site sewage disposal rules and requirements, flood and geologic hazard area regulations, and state or county road approach permit requirements.

If the Board concurs with the above recommendation, you may direct staff to prepare an order for your adoption implementing this recommendation. This order will incorporate the above recited findings of fact and conclusions, and the appropriate directives to not apply the minimum parcel size and use restrictions of the RR-5 zone and the C-S overlay zone to the subject property, subject to applicable public health and safety regulations.

Respectfully submitted,

Matt Spangler
Director